

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

JOINT APPENDIX

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

—
No. 18,247
—

712

LAWRENCE TYPOGRAPHICAL UNION No. 570, *Appellant*,

v.

FRANK McCULLOCH, ET AL., *Appellees*.

—
On Appeal from the United States District Court for the
District of Columbia

United States Court of Appeals
for the District of Columbia Circuit

FILED DEC 13 1963

Nathan J. Ponder

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CLERK
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FOR THE DISTRICT OF COLUMBIA CIRCUIT

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LAWRENCE TYPOGRAPHICAL UNION No. 570, *Appellant*,

v.

FRANK McCULLOCH, ET AL., *Appellees*.

JOINT APPENDIX

On Appeal from the United States District Court for the
District of Columbia

[Filed August 2, 1963]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C.A. 1969-63

LAWRENCE TYPOGRAPHICAL UNION, affiliated with
INTERNATIONAL TYPOGRAPHICAL UNION, AFL-CIO,
801½ Massachusetts Street, Lawrence, Kansas
Plaintiff,

v.

FRANK W. McCULLOCH, PHILIP RAY RODGERS, BOYD S.
LEEDOM, JOHN H. FANNING, GERALD A. BROWN,
Individually and as members of and constituting
the NATIONAL LABOR RELATIONS BOARD, 1717 Penn-
sylvania Avenue, N.W., Washington 25, D. C.
Defendants.

Complaint for Injunction and Declaratory Relief

1. This action arises under the Fifth Amendment to the Constitution of the United States and the Labor Management-Relations Act of 1947, 61 Stat. 136 *et seq.*, 29 U.S.C. Sec. 141 *et seq.*, hereafter referred to as "the Act", which is an act of Congress regulating commerce. The subject matter of the case involves an amount in excess of \$10,000. This Court has jurisdiction under 28 U.S.C. Sec. 1331 and 1337.

2. Lawrence Typographical Union, affiliated with International Typographical Union, AFL-CIO, (hereafter referred to as "the union") is a voluntary unincorporated labor organization maintaining its principal office at 801½ Massachusetts Street, Lawrence, Kansas. It is a labor organization within Section 2(5) of the Act. The union represents employees in the printing and mailing trades for purposes of collective bargaining. It brings this suit in its own behalf and on behalf of its members.

3. Defendant Frank W. McCulloch is the Chairman, and defendants Philip Ray Rodgers, Boyd S. Leedom, John H. Fanning, and Gerald A. Brown are members of the National Labor Relations Board, an agency of the United States, having been duly appointed under the provisions of Sec. 3(a) of the Act and having their principal offices at 1717 Pennsylvania Avenue, N.W., Washington 25, D. C. Defendants are hereinafter collectively referred to as "the Board".

4. Kansas Color Press, Inc., hereafter referred to as "the employer", a Kansas corporation with principal office and manufacturing plant in Lawrence, Kansas, is engaged in the printing business and is in interstate commerce.

5. For many years the union has been recognized by the employer as the representative for purposes of collective bargaining of its composing room and mailroom employees. Since about 1952 the employer and the union on behalf of these employees have entered into collective bargaining agreements. The last such agreement expired on May 31, 1961. On September 19, 1961 after many months of negotiations between the parties, the members of the union, having previously voted to take such action by secret ballot, went on strike against the employer. The employer hired other employees to work in the composing and mail room departments and has continued in production. The strike and picketing by members of the union, in support thereof, continue to this day.

6. On January 15, 1963 two individuals, Joe Swadley and Phoebe Schneck, filed with the Regional Director of the Board for the Seventeenth Region (hereafter the Regional Director), a petition purportedly under Section 9(c)(1)(A)(ii) of the Act to decertify the union as the bargaining representative of the employees in the mailroom department of the employer. On January 21, 1963 Francis G. Smysor, an individual, filed with the

Regional Director a petition purportedly under Section 9(c)(1)(A)(ii) of the Act to decertify the union as the bargaining representative of the employees in the composing room department of the employer. These petitions were docketed as Cases Nos. 17-RD-235 and 17-RD-236, respectively.

7. On February 12, 1963 the union filed a charge pursuant to Section 10(b) of the Act alleging *inter alia* that the employer had initiated and fostered the aforesaid decertification petitions and had thereby violated Sections 8(a)(1) and (2) of the Act. This charge was docketed as Case No. 17-CA-2118. On March 26, 1963 the Regional Director notified the union by letter that he was refusing to issue a complaint on this charge.

8. Thereafter, pursuant to Section 102.19 of the Board's Rules and Regulations, the union filed a request for review of the Regional Director's refusal to issue the complaint. On July 17, 1963 the General Counsel of the Board notified the union that the Regional Director's action in refusing to issue a complaint had been sustained, stating *inter alia* that his office had "concluded that the evidence was insufficient to establish that the Company initiated, fostered, or assisted the filing of the decertification petitions."

9. The union was not advised by the General Counsel of the identity of the individuals who gave information to his agents in the course of his investigation in Case No. 17-CA-2118, nor was it given copies of their statements, sworn to or unsworn, although an express request was made by the union therefor. Nor was the union given the opportunity to confront and cross-examine the individuals who gave information to the General Counsel's agents with respect to the charge.

10. Section 3(d) of the Act vests the General Counsel with final authority to determine in his discretion whether a complaint shall issue on a charge.

11. Prior to the filing of said petition and docketing of same by the Regional Director as aforesaid, the Board had delegated to the Regional Director for the Seventeenth Region pursuant to Section 3(b) of the Act its powers under Section 9 of the Act to determine the unit appropriate for the purposes of collective bargaining; to investigate and provide for hearings and determine whether a question of representation exists, and to direct an election or take a secret ballot under Section 9(c) of the Act and certify the results thereof.

12. Following the filing and docketing of the decertification petitions, 17-RD-235 and 17-RD-236, the Regional Director directed a hearing thereon. On May 7, 1963 while the aforesaid request for review in Case 17-CA-2118 was pending in the office of the General Counsel, said hearing was conducted by a hearing officer lawfully designated by the Regional Director of the Seventeenth Region. In the course of this hearing the union offered to prove that the decertification petitions had been initiated or fostered by the employer. The offer of evidence was relevant to the issues in the proceeding because a decertification petition initiated or fostered by an employer does not qualify as a petition under Section 9(c)(1)(A)(ii) of the Act and does not raise a question concerning representation warranting the direction of a representation election. The Hearing Officer, on the asserted ground that such evidence has no place in a representation proceeding because it would establish an unfair labor practice by the employer, refused, over the union's objection, to allow the union to introduce evidence in accordance with this offer of proof. The Hearing Officer also disallowed, on the same grounds, questions by the union to witnesses, including the decertification petitioners and an officer of the employer, respecting the employer's fostering of the decertification petitions. In the course of the hearing petitioners were permitted to amend their separate decertification petitions

to call for an election in a single unit of composing room and mailroom employees.

13. No part of the information or statements obtained by the agents of the General Counsel in the investigation of Case 17-CA-2118 was made part of the record in Cases 17-RD-235 and 17-RD-236.

14. Thereafter, pursuant to Section 102.67(a) of the Board's Rules and Regulations, the union filed a brief with the Regional Director urging that the decertification petitions be dismissed or alternatively, that the hearing be reopened to allow the union to present evidence in support of its aforesaid offer of proof.

15. On June 7, 1963 the Regional Director issued a Decision and Direction of Election in Cases 17-RD-235 and 17-RD-236. In this Decision the Regional Director affirmed the Hearing Officer's denial to the union of the opportunity to adduce evidence relating to the employer's initiation and fostering of the decertification petitions; this ruling was based solely on the authority of prior decisions by the Board that "unfair labor practice allegations are not properly litigable in a representation proceeding." He stated further that "A question affecting commerce exists concerning the representation of certain employees of the Employer, within Section 9(c)(1) and Section 2(6) and (7) of the Act." He thereupon directed that an election be held pursuant to the decertification petitions (as amended at the hearing) in a single unit of composing room and mailing room employees.

16. Thereafter, pursuant to Section 102.67(b) of the Board's Rules and Regulations, the union filed with the Board a request for review of the Regional Director's Decision and Direction of Election. In this request for review the union expressly objected to the Regional Director's determination that a question concerning representation exists without affording the union the opportunity to adduce evidence with respect to the

employer's initiation and fostering of the decertification petitions, and asserted that this ruling denied the union the hearing to which it was entitled under Section 9(c)(1) of the Act and the due process clause of the Fifth Amendment. On June 23, 1963 the Board issued a telegram order denying the union's request for review on the ground that "it raises no substantial issues warranting review."

17. The effect of the Board's order denying the request for review was to make final the Decision and Direction of Election issued by the Regional Director on June 7, 1963. Pursuant to such Direction the Regional Director will, barring the contingency stated in the next paragraph, conduct an election to decertify the union as the representative of the employees in the composing and mail room departments of the employer unless this Court grants the relief prayed herein.

18. On July 23, 1963 the union wrote a letter to the General Counsel requesting him to reconsider his decision sustaining the Regional Director's refusal to issue a complaint in Case 17-CA-2118 on two grounds, each unrelated to the alleged fostering of the decertification petitions. If the General Counsel should decide, on the basis of this request, to issue a complaint, no election would be held during the pendency of the complaint proceedings. It is expected that the General Counsel's decision on the aforesaid request, which is presently under advisement, will be made shortly, and before the final determination of this action. It is further expected that if the General Counsel adheres to his prior decision the Regional Director will schedule an election in Cases 17-RD-235 and 17-RD-236 within a period too brief to allow consideration by this Court of a motion for preliminary injunction if not filed before the announcement of the General Counsel's action.

19. By directing an election without giving the union the opportunity to adduce evidence with respect to the employer's initiation and fostering of the decertification

petitions and by giving conclusive effect to the General Counsel's refusal to issue a complaint in Case 17-CA-2118, the Board exceeded its powers under the Act and violated the express mandate of Section 9(c)(1) of the Act.

20. By directing an election without giving the union the opportunity to adduce evidence with respect to the employer's initiation and fostering of the decertification petitions and by giving conclusive effect to the General Counsel's refusal to issue a complaint in Case 17-CA-2118, the Board denied the union and its members property without due process of law contrary to the Fifth Amendment of the Constitution.

21. The union has no adequate remedy in law and has no means of redress of the wrong whereof it here complains, the union having exhausted its administrative remedies, and will suffer irreparable injury unless the Court, pursuant to mandatory injunction proceedings, reviews the action of the defendants and grants the relief requested herein.

WHEREFORE, plaintiff prays:

a. That the Court issue a judgment declaring the decision and direction of election in Cases 17-RD-235 and 17-RD-236 to be contrary to law and null and void.

b. That a permanent injunction be granted and issued from this Court to the defendants Frank W. McCulloch, Philip Ray Rodgers, Boyd S. Leedom, John H. Fanning, and Gerald A. Brown, individually and as members of the National Labor Relations Board, committing, requiring, and compelling them and the National Labor Relations Board and all those acting under and by virtue of its authority to vacate and set aside the Decision and Direction of Election in Case Nos. 17-RD-235 and 17-RD-236 and further enjoining defendants from holding an election in Cases 17-RD-235 and 17-RD-236 except in consequence of proceedings in conformity with Section 9(c)(1) of the Act and the Fifth Amendment.

c. That a preliminary injunction be granted enjoining defendants individually and as members of the National Labor Relations Board and all those acting under and by virtue of its authority from holding an election in Board Cases 17-RD-235 and 17-RD-236 until the final disposition of this action.

d. That such other further relief be granted as this Court deems appropriate.

GERHARD P. VAN ARKEL
GEORGE KAUFMANN
1730 K Street, N.W.
Washington 6, D. C.
FE 8-7777
Attorneys for Plaintiff

Affidavit in Support of Motion for Preliminary Injunction

[Filed August 6, 1963]

• • •

EXHIBIT 1

Lawrence, Kansas

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

KANSAS COLOR PRESS, INC., Employer

and

Case No. 17-RD-235

JOE SWADLEY and PHOEBE SCHNECK,
Employees

Petitioners

and

FRANCIS G. SMYSOR, Employee

Petitioner

and

Case No. 17-RD-236

LAWRENCE TYPOGRAPHICAL UNION
No. 570, affiliated with INTER-
NATIONAL TYPOGRAPHICAL UNION,
AFL-CIO¹

Union

Decision and Direction of Election

Upon separate petitions duly filed under Section 9(c) of the National Labor Relations Act, a consolidated hearing was held before a hearing officer at Kansas City, Missouri.²

¹ The name of the Union appears as corrected at the hearing.

² Following the hearing the Union filed a Motion to Correct Record. This motion is granted.

The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.³

³ The hearing officer overruled the Union's motion to exclude the Employer from the hearing and denied the Union's request that the Employer be excluded from participation in the hearing. The Union bases its position on the contentions that (1) Employer participation is tantamount to assisting or promoting the processing of a decertification petition and (2) the Employer has not shown a sufficient interest to participate under Section 102.8 of the Board's Rules and Regulations. As to (1) the contention has no place herein as it goes to matters concerning unfair labor practices. Also, in agreement with the hearing officer, I find that point (2) is without merit, and that in accordance with the usual Board procedures the Employer's participation was proper.

The Union also takes the position that evidence of certain unfair labor practices, alleged to have been committed by the Employer, constitutes an appropriate part of the record in this proceeding. In furtherance of this position the Union (1) moved for production and incorporation in the record herein of all the statements and investigative reports in the Regional Director's files in Case No. 17-CA-2118 (presently pending appeal to the General Counsel from my dismissal) and (2) presented an offer of proof that the Employer has engaged in activity proscribed by Section 8(a)(1), (2), (3) and (5) of the Act. The Union urges that the doctrine of *Times Square Stores Corporation*, 79 NLRB 361, as further amplified in *Union Manufacturing Company*, 123 NLRB 1633, be reconsidered and repudiated. As indicated in the *Times Square* and *Union Manufacturing* cases the Board has had occasion to consider the Union's contentions and has repeatedly stated that unfair labor practice allegations are not properly litigable in a representation proceeding. Accordingly, in line with the past decisions of the Board, I hereby affirm the hearing officer's action in denying the motion for production and offer of proof. Consistent with the foregoing, I find without merit the Union's contention that the facts contained in the investigatory file in Case No. 17-CA-2118 are relevant to my decision herein or that my decision herein is in any manner predicated on prior consideration of the facts disclosed by the investigation of that unfair labor practice case.

The Union further contends that the hearing officer erred in quashing the Union's subpoenas for payroll records and the pre-hire correspondence between the Employer and Smedley. The Union, however, failed to offer additional evidence or otherwise indicate how the evidence sought would tend to refute that already in the record. As the record herein affords an adequate basis for a determination of the status of the Petitioners, as discussed *infra*, I affirm the hearing officer's ruling. *Spartan Department Stores*, 140 NLRB No. 59; *Coney Island, Inc.*, 140 NLRB No. 9; *Monarch Rubber Company, Inc.*, 129 NLRB 482.

The Petitioners' motions to amend the petitions to conform to the unit found appropriate herein were granted over the Union's objection. The Union contends that the hearing officer erred in that (1) the amendments were Employer inspired and (2) the Petitioners lacked authority to request decertifica-

Pursuant to Section 3(b) of the Act, the Board has delegated its powers herein to the undersigned Regional Director.⁴

Upon the entire record the Regional Director finds:

1. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

2. The labor organization named above claims to represent certain employees of the Employer.

3. The Petitioners assert that the Union, which is currently being recognized by the Employer as the bargaining representative of the employees in the appropriate unit, is no longer a representative as defined in Section 9(a) of the Act.

The Union contends that Francis G. Smysor, the Petitioner in Case No. 17-RD-236, is a supervisor within the meaning of the Act. Although not pressing the point in its brief the Union also appears to take the position that Joe Swadley and Phoebe Schneck, the Petitioners in Case No. 17-RD-235, are not qualified to file a petition by reason of their being part-time employees.⁵

Concerning *Smysor* the record shows that he has been employed by the Employer since January 2, 1962, as a compositor in the composing room where he and six other

tion in a unit that differed from that set forth in the original petitions. I find the Union's contentions to lack merit and affirm the hearing officer's ruling. As to (1), again an allegation of unfair labor practices is involved. As to (2) the Board frequently considers alternative or amended positions taken at a hearing by petitioners as representatives of the employees concerned, and I see no reason to depart from this procedure in the instant case. *The North Electric Manufacturing Company*, 89 NLRB 260, 261.

⁴ Inasmuch as the record and the briefs do not appear to raise issues that necessarily warrant transfer of this case directly to the Board for decision, the Union's motion to transfer is denied.

⁵ All three of the Petitioners have worked for the Employer during the strike which is hereinafter mentioned.

compositors work under the supervision of James R. Tatham, the composing room foreman. Smysor has had 27 years of experience in the printing industry. One other compositor has had 8 to 10 years more experience but the other 5 for the most part have had less. Smysor, who like the other 6 compositors is hourly paid, is the highest paid compositor earning 7 to 8 percent more than the next highest man and 18 percent more than the lowest paid man. Foreman Tatham's salary exceeds Smysor's earnings by 45 percent. During a two-week period in 1962, when Tatham took his vacation, and more recently during a period of approximately three weeks in February or early March 1963, Smysor was in charge of the composing room. On these occasions, however, Tatham gave Smysor detailed instructions on the work to be done and how it was to be done and additionally the composing room received close supervision from the foreman of the stereotype room and Warren Zimmerman, the Employer's expeditor. The Employer has no one designated as acting foreman of the composing room. Smysor has never hired, discharged, or laid off any employees and has no authority to do so. There is no evidence that he has authority to make effective recommendations as to any change in the employment status of other employees or to exercise any other supervisory function. On the basis of the entire record herein, I find that Smysor is not a supervisor⁶ and is therefore qualified to file the petition in Case No. 17-RD-236.

Joe Swadley has been employed by the Employer in several capacities since 1959. Since September 19, 1961, he has been employed as a mail machine operator in the mailing room where he operates two machines with the assistance of 10 female employees who work as mailers. Swadley normally works 5 days a week 7½ hours a day. He works full time on the mailing machines. Additionally,

⁶ *E. L. Downing, Inc.*, 127 NLRB 288, 289; *Porto Rican American Sugar Refinery, Inc.*, 125 NLRB 384, 386; *The Woodman Company, Inc.*, 119 NLRB 1784, 1787.

he has contracted to perform and performs lawn work for the Employer, on the plant premises after his regular work time as a mail machine operator.

Phoebe Schneck started working for the Employer on September 20, 1961. Schneck is a mailer in the mailing room. During the week preceding the hearing herein she worked 37½ hours—a regular work week—and she averages 3½ regular work weeks per month.

The record contains no evidence that either Joe Swadley or Phoebe Schneck possesses any supervisory authority, and I find that they are regularly employed employees eligible to file the petition in Case No. 17-RD-235.

A question affecting commerce exists concerning the representation of certain employees of the Employer, within Section 9(c)(1) and Section 2(6) and (7) of the Act.

4. The Employer is principally engaged in the printing of magazines and circulars at its plant in Lawrence, Kansas. The plant is made up of several departments which, excluding the office, are the composing room, electrotpe room, stereotype room, press room, binding and mailing department, maintenance crew and miscellaneous warehouse and stock room personnel.

For a period of several years the Employer has recognized the Union as the collective bargaining representative of its mailing room⁷ and composing room employees. In 1958 when the parties negotiated their last contract they negotiated for and reached agreement on a contract covering both rooms. The expiration of the last contract, on May 31, 1961, was followed by a strike of the composing room and mailing room employees on September 19, 1961. This strike is still in progress. No other employees at the plant have joined the strike. The Union has been bargaining with the Employer on behalf of a unit

⁷ The mailing room is a part of the binding and mailing department.

including employees of both the composing room and the mailing room.

The original petitions herein sought decertification elections in the "mailing department," Case No. 17-RD-235, and among all composing room employees excluding supervisory employees as defined in the Act and all other employees, Case No. 17-RD-236. At the hearing the Union took the position that the only appropriate unit is a single unit embracing both mailing room and composing room employees. After the Employer agreed that a unit made up of employees in both rooms is an appropriate unit the Petitioners moved to amend both petitions to seek elections in the following identical units which I find to be appropriate for the purposes of collective bargaining within the meaning of Section 9(c) of the Act.

All composing room and mailing room employees of the Employer, excluding office clerical employees, all other employees, and guards and supervisors within the meaning of the Act.

Direction of Election⁸

An election by secret ballot will be conducted by the undersigned Regional Director among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also

⁸ Within 13 days from the date of this decision and direction of election, the Employer shall submit to the undersigned Regional Director a complete and accurate list of all employees in the unit found appropriate herein who would be eligible voters pursuant to this direction of election. If review is requested and granted, the Employer shall submit a complete and accurate list of all employees in the unit found appropriate by the Board who would be eligible voters, within three days from the date of the Board's decision and direction of election, if any.

eligible are employees engaged in an economic strike which commenced less than twelve (12) months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period and employees engaged in a strike who have been discharged for cause since the commencement thereof, and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by

LAWRENCE TYPOGRAPHICAL UNION No. 570,
affiliated with INTERNATIONAL TYPOGRAPHICAL UNION,
AFL-CIO.

HUGH E. SPERRY
Regional Director for the 17th Region

Dated: June 7, 1963
at Kansas City, Missouri

EXHIBIT 2

WESTERN UNION
TELEGRAM

TXA080 WA295

(TX) GOVT PD WUX WASHINGTON DC 23 325P EDT
GEORGE KAUFMANN

SUITE 1004 1730 K ST NORTHWEST WASHDC

RE: KANSAS COLOR PRESS, INC., 17-RD-235; 236; IT IS HEREBY ORDERED THAT THE UNION'S REQUEST FOR REVIEW OF THE REGIONAL DIRECTOR'S DECISION AND DIRECTION BE, AND IT HEREBY IS, DENIED AS IT RAISES NO SUBSTANTIAL ISSUES WARRANTING REVIEW. BY DIRECTION OF THE BOARD

HOWARD W KLEEB ASSOC EXEC SEC NLRB

17-RD-235 236

(37).

[Caption Omitted]

**Motion of Defendants to Dismiss the Complaint or, in the
Alternative, for Summary Judgment in Their Favor**

[Filed Aug. 22, 1963]

1. Defendants move that the complaint herein be dismissed on the grounds that:

(a) This Court lacks jurisdiction over the subject matter of the action;

(b) The complaint fails to state a claim warranting relief.

(c) The suit is premature.

2. In the alternative, defendants move that summary judgment be granted in their favor on the basis of the complaint and the exhibit attached to defendants' motion.

WHEREFORE, it is respectfully requested that the complaint be dismissed or, in the alternative, that summary judgment be entered in defendants' favor.

MARCEL MALLET-PREVOST
Assistant General Counsel
National Labor Relations Board

Dated at Washington, D. C.
this 21st day of August, 1963.

EXHIBIT A

(Seal)

**NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL
WASHINGTON 25, D. C.**

July 17, 1963

**Re: Kansas Color Press, Inc.
Case No. 17-CA-2118**

**Mr. Gerhard P. Van Arkel
Mr. George Kaufmann
Attorneys at Law
Van Arkel and Kaiser
1730 K Street, N. W.
Washington 6, D. C.**

**Mr. Stanley D. Rostov
Attorney at Law
504 Commerce Building
Kansas City, Missouri**

Gentlemen:

Your appeal from the Regional Director's refusal to issue complaint in the above case, charging violations under Section 8 of the National Labor Relations Act, has been duly considered.

This Office sustains the ruling of the Regional Director. It was concluded that the evidence was insufficient to establish that the Company, within the 10(b) period, insisted to impasse on bargaining for the use of the Union label or admission of employees to Union membership. It was further concluded that the evidence was insufficient to establish that the Company initiated, fostered, or assisted the filing of the decertification petitions. Nor did the Company violate the Act by refusing to bargain after the decertification petitions had been filed since the evidence failed to establish that these petitions were tainted by

illegal assistance and it could not be established that the Company's refusal was based upon any reason other than its good faith doubt of the Union's majority status. In making this determination, it was noted that the strike was economic in nature, many of the strikers had been permanently replaced, and it did not appear that the Union still represented a majority of employees at that time. Finally, it was concluded, under the circumstances of this case, that the Company did not violate the Act by refusing to pay vacation pay to strikers. See *Philip Carey Manufacturing Co.*, 140 NLRB No. 90; *General Electric Co.*, 80 NLRB 510, 511-512.

Very truly yours,

ARNOLD ORDMAN
General Counsel

By IRVING M. HERMAN
Irving M. Herman
Director, Office of Appeals

cc: [Omitted]

Certified Mail

[Caption Omitted]

Memorandum and Order

[Filed October 3, 1963]

This matter comes before the court on a complaint by the plaintiff, Lawrence Typographical Union, to enjoin the defendants, National Labor Relations Board, from conducting a representation election among the composing room and mailroom employees of the Kansas Color Press, Inc.

The plaintiff Union has for several years been the collective bargaining representative of the employees. The last agreement between the employer and the employees expired on May 31, 1961. Subsequent negotiations for a new contract were unsuccessful; and, on September 19, 1961, the members of the Union went on strike. The employer continued to operate by hiring new employees and the strike has continued through the present time.

On January 15, 1963, two individuals, apparently employees of the Kansas Color Press, filed petitions under 9(c)(1)(A)(ii) of the Labor Management Relations Act of 1947, 61 Stat. 136, et seq., 29 U.S.C. sec. 141 et seq., to decertify the Union as the bargaining representative of the mailroom employees. A similar petition was filed on January 21, 1963 on behalf of the composing room employees.

Subsequently, on February 12, 1963, the Union charged that the employer had initiated and fostered the above mentioned decertification petitions, in violation of section 8(a)(1) and (2) of the Act (29 U.S.C. 158(a)(1) and (2)). On March 26, 1963, the Regional Director of the Board refused to issue a complaint on the charge by the Union. This refusal was thereafter sustained by the General Counsel of the Board.

On May 7, 1963, a hearing officer conducted a hearing on the decertification petitions in order to determine whether a question of representation existed. At this hearing, the Union offered evidence to support the contention that the petitions had been initiated or fostered by the employer. The hearing officer did not allow the Union to introduce this evidence. This ruling was subsequently sustained by the Regional Director on the authority of prior Board decisions that "unfair labor practice allegations are not properly litigable in a representation proceeding." An election was ordered on the basis of the petitions and the hearing.

The Union appealed the ruling of the Regional Director and, on June 23, 1963, the Board denied the appeal on the ground that "it raises no substantial issues warranting review". This refusal is currently under review by the General Counsel of the Board.

The plaintiff now asks this court to declare the decision to conduct an election to be contrary to law and null and void and to enjoin the defendants from conducting an election.

The Board has moved to dismiss the complaint, or, in the alternative, for summary judgment.

At the outset, the question of the jurisdiction of this court was raised. It is, however, well settled that the District Court has jurisdiction of an original suit to vacate a determination of the Board made in excess of its powers. As stated by the Supreme Court in *Leedom v. Kyne*, 1958, 358 U.S. 184, 188,

"(T)his case . . . involves 'unlawful action of the Board (which) has inflicted an injury on (respondent).' Does the law 'apart from the review provisions of the . . . Act' afford a remedy? We think the answer surely must be yes."

Further, the Court of Appeals for the District of Columbia Circuit recently stated that orders of the Board

are judicially reviewable "if the Board acts in excess of its delegated powers and contrary to a specific prohibition in the Act . . .". *Miami Newspaper Printing Pressmen's Union Local 46 v. McCulloch*, U.S. App. D.C., No. 17,459, July 18, 1963, slip op. p. 7.

The gravamen of the complaint here asserts that the Board has disobeyed the mandate of sec. 9(c)(1) of the Act. Thus, if the defendant has exceeded its statutory authority, and if the plaintiff has been injured as a result thereof, this court has jurisdiction to remedy the effect of the unlawful action.

Section 9(c)(1) of the Act, 29 U.S.C. 159(c)(1) provides:

" . . . the Board shall investigate such petitions and if it has reasonable cause to believe that a question of representation affecting commerce exists *shall provide for an appropriate hearing upon due notice.*" (Our emphasis)

The question then is, did the defendant conduct an "appropriate hearing" on the representation issue in denying the plaintiff's offer of evidence on company interference.

The fact that the Union has been precluded from introducing evidence of an unfair labor practice at the representation hearing does not indicate a violation of the Act. Neither does it indicate that the Board was arbitrary in this refusal. If the Union has evidence of employer domination, it may initiate an unfair labor practice case by alleging a violation of Section 8(a)(2) of the Act. If the allegation appears substantial, the General Counsel may issue a complaint and prosecute before a Trial Examiner. The Union, however, has not sustained this preliminary burden.

In accordance with the procedure established by the Board, the hearing officer may not adduce such evidence of an alleged unfair labor practice in a representation hearing.

The Board enunciated this policy in *Union Mfg. Co.*, 123 NLRB 1633, 1634,

"We have carefully considered and reappraised the relative advantages and disadvantages of retaining, as an exception to the general rule, the practice of allowing issues of employer instigation of, or assistance in, the filing of the decertification petition to be litigated in the representation proceeding. It is our opinion that the same factors which weigh against permitting litigation of unfair labor practice matters in other types of representation cases are present, and should likewise prevail in decertification cases. If there is a basis for alleging employer responsibility for the filing of a decertification petition, the Board's complaint procedures provide a forum in which such an issue may be properly litigated, and an appropriate remedy obtained. At the same time, valid decertification petitions may be processed with a minimum of complication and delay. Accordingly, we herein enunciate the Board policy to exclude from decertification cases any evidence of employer participation in the institution of the proceeding, whether the alleged evidence pertains to showing of interest or to employer responsibility for the filing of the petition."

This policy appears to be sound and it certainly does not contravene the dictates of Congress to conduct an "appropriate hearing" in representation cases. This is a discretionary matter and is unlike *Leedom v. Kyne*, which rested on a "specific prohibition in the Act", *supra* at 188.

It is the opinion of this court that the Board has conducted this hearing within the requirements of section 9(c) of the Act.

Therefore, in accordance with the foregoing, it is this 3rd day of October, 1963,

ORDERED, that plaintiff's motion for a preliminary injunction be, and the same hereby is, denied; and

FURTHER ORDERED, that defendants' motion for summary judgment be, and the same hereby is, granted.

Counsel for defendants may submit findings of fact and conclusions of law in accordance with this memorandum.

LEONARD P. WALSH
Leonard P. Walsh, *Judge*

Gerhard P. Van Arkel, Esq.
George Kaufmann, Esq.
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Attorneys for Plaintiff

Marcel Mallet-Prevost, Esq.
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Attorneys for Defendants

[Caption Omitted]

Order [Substituting Party Defendant]

[Filed November 1, 1963]

It appearing that Philip Ray Rodgers, a defendant in this action, has ceased to hold office as a member of the National Labor Relations Board and that Howard Jenkins, Jr. has succeeded him, it is hereby ordered pursuant to Rule 25 (d) of the Federal Rules of Civil Procedure that the said Howard Jenkins, Jr. be substituted as a party-defendant individually and as a member of the National Labor Relations Board in the place of Philip Ray Rodgers. It is further ordered that in all further proceedings the caption of this case be amended in accordance with this order of substitution.

LEONARD P. WALSH, J.

[Caption Omitted]

Findings of Fact, Conclusion of Law, and Order

[Filed November 1, 1963]

This case came on to be heard on August 23, 1963, on plaintiff's motions for a preliminary injunction and summary judgment in its favor and on defendants' motion to dismiss the complaint, or, in the alternative, for summary judgment in their favor. The Court, after hearing the argument of counsel, considering the pleadings and memoranda which have been filed, and being fully advised in the premises, makes the following findings of fact and conclusion of law:

Findings of Fact

1. Plaintiff is an unincorporated labor organization, which for many years was recognized as the collective bargaining representative of the composing and mailing room employees of Kansas Color Press, Inc., at its manufacturing plant in Lawrence, Kansas.

2. The last of a series of contracts between the plaintiff union and the Company expired on May 31, 1961. Subsequent negotiations for a new contract were unsuccessful; and, on September 19, 1961, the members of the Union went on strike and commenced picketing. The employer continued to operate by hiring new employees and the Union's picketing has continued to the present.

3. On January 15, 1963, two employees of the Company, filed petitions under Section 9(c)(1), (A), (ii) of the National Labor Relations Act (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Secs. 151, *et seq.*) to decertify the Union as the bargaining representative of the mailroom employees. A similar petition was filed by a third employee on January 21, 1963, on behalf of the composing room employees.

4. On February 12, 1963, the Union filed an unfair labor practice charge with the Regional Director for the Board's

Seventeenth Region alleging that the Company had engaged in conduct violative of Section 8(a)(1), (2), (3) and (5) of the Act. The violations alleged included, *inter alia*, the initiation and fostering of the above-mentioned decertification petitions. The Regional Director conducted an investigation of these charges, and determined, as a result of that investigation, that they were without merit. Accordingly, the Regional Director advised the Union that no complaint would issue. The Union thereafter filed an appeal with the General Counsel from the Regional Director's refusal to issue a complaint on its charge.

5. On May 7, 1963, a representation hearing was held on the decertification petitions, at the direction of the Regional Director, following a preliminary investigation by the Regional Office. At this hearing, the Union moved for the production and incorporation into the record of all statements and reports in the files of the Regional Office compiled in the course of its investigation of the Union's unfair labor practice charge. In addition, the Union offered to prove that the Company had engaged in the unfair labor practices alleged in the charge, including the initiation and fostering of the decertification petitions. The hearing officer denied the motion and rejected the offer of proof, but permitted the Union to litigate the employee status of the three individuals who had filed the decertification petitions. The hearing officer also disallowed, on the same grounds, questions by the Union of witnesses respecting the employer's fostering of the decertification petitions.

6. On June 7, 1963, the Regional Director issued a Decision and Direction of Election in which he: (1) affirmed the hearing officer's denial of the Union's motion and offer of proof on the ground that "unfair labor practice allegations are not properly litigable in a representation proceeding," (2) found that the three petitioners were regular employees, rather than supervisors and hence were not disqualified from filing decertification petitions on behalf

of the employees in the unit, (3) concluded that a question of representation affecting commerce existed, and (4) directed that an election be held pursuant to the decertification petitions, in a single unit of composing and mailing room employees.

7. The Union appealed to the Board from the Decision and Direction of Election, challenging the Regional Director's action in directing an election without first affording the Union an opportunity to litigate at the representation hearing the employer's alleged initiation and fostering of the decertification petitions. On June 23, 1963, the Board denied the appeal on the ground that it raised "no substantial issues warranting review."

8. On July 17, 1963, the General Counsel acted on the Union's appeal from the Regional Director's refusal to issue a complaint on the unfair labor practice charge, affirming that refusal as to each of the violations alleged. With respect to the Union's contention that the Company had initiated or fostered the decertification petitions, in violation of Section 8(a)(1) and (2) of the Act, the General Counsel stated that it had been "concluded that the evidence was insufficient to establish" this allegation.

Conclusions of Law

Plaintiff has failed to establish that the representation determinations complained of violated either a mandatory provision of the National Labor Relations Act or constituted a deprivation of due process under the Constitution of the United States. On the contrary, the Court finds that defendants' determinations were within the broad discretionary authority accorded by the Act.

WHEREFORE, it is hereby ORDERED, ADJUDGED AND DECREED THAT:

(1) Plaintiff's motion for a preliminary injunction be, and the same hereby is, denied;

(2) Plaintiff's motion for summary judgment be, and the same hereby is, denied; and

(3) Defendants' motion for summary judgment be, and the same hereby is, granted.

LEONARD P. WALSH
Leonard P. Walsh, *Judge*

Gerhard P. Van Arkel, Esq.
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Attorneys for Plaintiff

Marcel Mallet-Prevost, Esq.
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National Labor Relations Board
1717 Pennsylvania Avenue, N. W.
Attorneys for Defendant

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil No. 1969-63

LAWRENCE TYPOGRAPHICAL UNION, *Plaintiff,*

v.

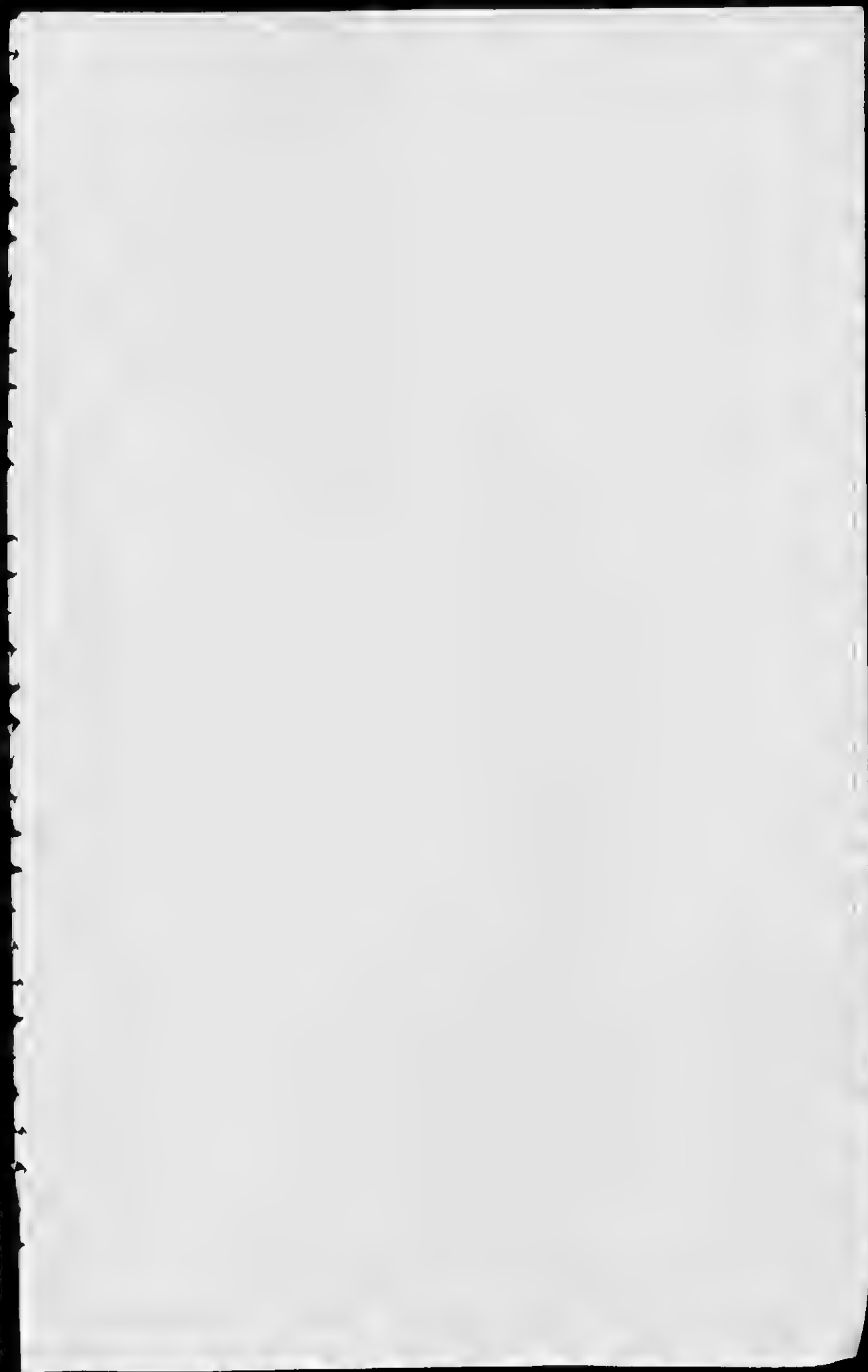
McCulloch, et al., *Defendants.*

Notice of Appeal

Notice is hereby given this 6th day of November, 1963, that plaintiff hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 1st day of November, 1963 in favor of defendants against said plaintiff.

GEORGE KAUFMANN

Attorney for Plaintiff



BRIEF FOR APPELLANT

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,247

LAWRENCE TYPOGRAPHICAL UNION No. 570, *Appellant*

v.

FRANK W. McCULLOCH, ET AL., *Appellees.*

On Appeal from the United States District Court for the
District of Columbia

United States Court of Appeals
for the District of Columbia Circuit

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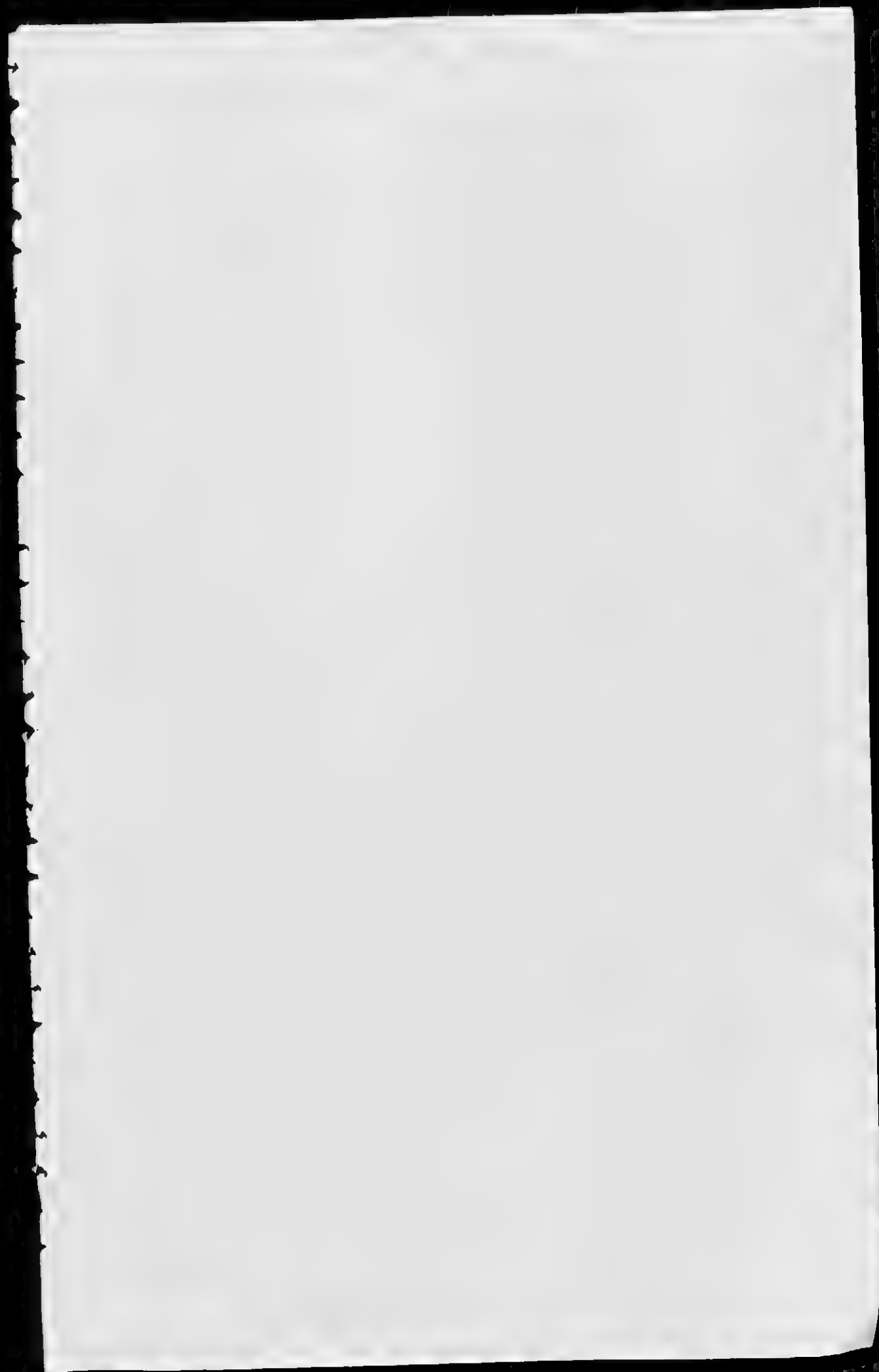
FILED JAN 10 1964

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Attorneys for Appellant





QUESTION PRESENTED

Did the National Labor Relations Board exceed its powers under Section 9(c)(1) of the Labor-Management Relations Act of 1947 and the Fifth Amendment to the Constitution by directing a decertification election without affording the incumbent union the opportunity to prove at the representation hearing that the decertification petitions did not raise a question of representation because they were initiated or fostered by the employer?



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IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,247

LAWRENCE TYPOGRAPHICAL UNION No. 570, *Appellant*

v.

FRANK W. McCULLOCH, ET AL., *Appellees.*

On Appeal from the United States District Court for the
District of Columbia

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an action to set aside a Decision and Direction of Election of the National Labor Relations Board on the ground that it violated Section 9(c)(1) of the Labor-Management Relations Act of 1947, 61 Stat. 136 *et seq.*, 29 U.S.C. § 141 *et seq.* (hereafter referred to as "the Act") and the Fifth Amendment to the United States

Constitution. As the complaint alleged (JA 2),¹ the District Court had jurisdiction under 28 U.S.C. § 1331 and 28 U.S.C. § 1337. On November 1, 1963 the District Court entered an order granting summary judgment to defendants (JA 26-29). Plaintiff filed a notice of appeal on November 6, 1963 (JA 30) and docketed the appeal in this Court on November 26, 1963. This Court has jurisdiction of the appeal under 28 U.S.C. § 1291.

STATEMENT OF THE CASE

A. THE FACTS UNDERLYING THIS ACTION

For many years Lawrence Typographical Union No. 570 (hereafter "the union") has been recognized as the collective bargaining representative of the composing and mailroom employees of Kansas Color Press (hereafter "the company"). The last of a series of contracts between the union and the company expired on May 31, 1961. Subsequent negotiations for a new contract were unsuccessful, and on September 19, 1961 the members of the union went on strike and commenced picketing in support of that strike. The company continued to operate by hiring new employees and the union's picketing has continued to the present.²

On January 15, 1963 two individuals working in the company's mailroom filed with the Regional Director of the Board for the Seventeenth Region (hereafter "the regional director") a petition for an election pursuant to § 9(c)(1)(A)(ii) of the Act to decertify the union as the bargaining representative of the employees in the company's mailroom department. On January 21, 1963 Francis

¹ "JA" refers to the Joint Record Appendix filed in this Court.

² The District Court made factual findings (JA 26-28) which we fully accept for purposes of this appeal. However, for the sake of clarity and completeness, the narrative of the underlying facts will rely also on other undisputed facts in the record which were not the subject of express findings.

G. Smysor, an individual working in the composing room, filed a similar petition to decertify the union as the bargaining representative of the employees in the composing room.

On February 12, 1963 the union filed a charge pursuant to Section 10(b) of the Act which alleged that the company had engaged in conduct violative of Sections 8(a)(1), (2), (3) and (5) of the Act. The violations alleged included *inter alia* the initiation and fostering of the above-mentioned decertification petitions.³ The regional director on behalf of the General Counsel conducted an investigation of these charges and advised that he would not issue a complaint. The charging union was not advised of the identity of individuals who had given information in the course of his investigation; nor was the union accorded the opportunity to see any statements of these informants or to confront and cross-examine them with respect to the charge. The union thereafter filed a formal request with the General Counsel to review the regional director's refusal to issue a complaint on its charge. Subsequently, on July 17, 1963 the General Counsel affirmed the regional director's action. With respect to the charge that the company had initiated and fostered the decertification petitions, his letter asserted that it had been "concluded that the evidence was insufficient to establish" this allegation. (JA 18).

On May 7, 1963, while the aforesaid request for review was pending in the office of the General Counsel, a hearing was held on the decertification petitions, at the direction of the regional director following a preliminary investigation by the regional office. At this hearing, the union moved for the production and incorporation into the record of all statements and reports in the files of the Regional Office compiled in the course of its investigation of the

³ The other charges were that the company had failed to fulfill its duty to bargain by insisting on illegal or nonmandatory provisions and that it had discriminated against strikers with respect to accrued vacation benefits.

union's unfair labor practice charge. In addition, the union offered to prove that the company had initiated and fostered the decertification petitions. The hearing officer denied the motion and rejected the offer of proof, and also disallowed questions by the union of witnesses respecting the employer's fostering of the decertification petitions. The hearing officer did permit the union to litigate the employee status of the decertification petitioners, that is, whether they were supervisors.

On June 7, 1963 the regional director issued a Decision and Direction of Election (JA 10-16). The regional director (1) affirmed the hearing officer's denial of the union's offer of proof on the ground that "unfair labor practice allegations are not properly litigable in a representation proceeding," (2) found that the three petitioners were regular employees, rather than supervisors and hence were not disqualified from filing decertification petitions on behalf of the employees in the unit, (3) concluded that a question of representation affecting commerce existed, and (4) directed that an election be held pursuant to the decertification petitions, in a single unit of composing and mailing room employees.

Thereupon, the union filed with the Board a request to review the aforesaid Decision and Direction of Election, challenging *inter alia*, the regional director's action in directing an election without first affording the union an opportunity to litigate at the representation hearing the company's alleged initiation and fostering of the decertification petitions.⁴ On June 23, 1963 the Board by telegram order denied the request for review on the ground that it raised "no substantial issues" warranting review. (JA 16). The effect of the Board's order denying the request for review was to make final the Decision and Direction of Election issued by the regional director on June 7, 1963.

⁴ The request for review also raised certain other issues not immediately relevant to the present suit.

B. THE PROCEEDINGS IN THE COURT BELOW

On August 2, 1963 the union brought this suit in the United States District Court for the District of Columbia, naming as defendants the Chairman and members of the National Labor Relations Board.⁵ The complaint (JA 2-9) alleged that the Board had exceeded its powers and violated Section 9 (c)(1) of the Act and the Fifth Amendment to the United States Constitution by directing an election without giving the union the opportunity to adduce evidence that the decertification petitions failed to raise a question of representation warranting an election because they had been initiated or fostered by the employer company. (JA 7-8). The complaint invoked the equitable powers of the District Court to enter an order adjudging the Decision and Direction of Election to be contrary to law and null and void, and enjoining the Board from acting pursuant to the aforesaid Direction of Election (JA 8-9).⁶

Thereafter, the union moved for a preliminary injunction and for summary judgment and submitted, in support of these motions, an affidavit by its attorney supporting the facts alleged in the complaint. Defendants responded by a motion to dismiss the complaint, or, in the alternative, for summary judgment in their favor. (JA 17).

On August 23, 1963 the District Court (Leonard P. Walsh, J.) heard argument on the aforesaid motions. On October 3, 1963 the Court granted defendants' motion for summary judgment. In his memorandum opinion (JA 20-24) Judge Walsh rejected the defendants' contention

⁵ On November 1, 1963 the District Court entered an order substituting Howard Jenkins, Jr. as a party defendant in place of Philip Ray Rodgers, whom Jenkins had replaced as a member of the Board. (JA 25).

⁶ By stipulation of the parties the election was held, as scheduled, on August 28, 1963, but the ballots were impounded. A similar procedure had been followed in *Miami Newspaper Printing Pressmen's Local No. 46 v. McCulloch*, U.S. App. D.C., 322 F. 2d 993, 996.

that he lacked jurisdiction (JA 22) but decided that they had not violated Section 9(c)(1) of the Act. He stated that the Board's policy not to allow the union to litigate whether the employer had initiated and fostered the decertification petitions "appears to be sound and it certainly does not contravene the dictates of Congress to conduct an 'appropriate hearing' in representation cases. This is a discretionary matter and is unlike *Leedom v. Kyne* [358 U.S. 184] which rested on a 'specific prohibition in the Act', *supra* at 188." (JA 23). The Court did not discuss the union's contention that Section 9(c)(1) expressly requires that the determination of the existence of a question concerning representation be made "upon the record of such hearing"; nor does the opinion reveal whether the Court considered the claim that the Board had violated the due process clause of the Fifth Amendment.

On November 1, 1963 the District Court entered findings of fact and conclusions of law and an order denying plaintiff's motions and granting defendants' motion for summary judgment. (JA 26-29). This appeal is taken from that order.

CONSTITUTION AND STATUTES INVOLVED

This case involves the Fifth Amendment to the United States Constitution and Sections 3(d) and 9(c)(1) of the Act. They are printed in Appendix A, *infra*.

STATEMENT OF POINTS

1. The National Labor Relations Board exceeded its powers under Section 9(c)(1) of the Labor-Management Relations Act of 1947 as amended, and violated the Fifth Amendment of the United States Constitution, by directing a decertification election without affording the incumbent union the opportunity to prove at the representation hearing that the decertification petitions did not raise a question of representation because they were initiated or fostered by the employer.

SUMMARY OF ARGUMENT

I.

A. Section 9(c)(1)(A)(ii) empowers the Board to direct an election to decertify a recognized bargaining representative only after it has held "an appropriate hearing" and found "upon the record of such hearing that such question of representation exists." A decertification petition which was initiated or fostered by the employer does not raise a question of representation and must be dismissed without the holding of an election. *Sperry Gyroscope Corp.*, 136 NLRB 294. At the representation hearing the Board denied the union any opportunity to prove that the company here had initiated and fostered the petitions. This action was taken on the authority of Board decisions which hold that such allegations may not be litigated in a representation proceeding, because employer initiation not only voids the decertification petition but also constitutes an unfair labor practice. *Times Square Stores Corp.*, 79 NLRB 361; *Union Manufacturing Co.*, 123 NLRB 1633.

These Board decisions are fallacious because they overlook the obvious truth that the same fact may be probative of more than one ultimate finding from which legal consequences arise. The fact which the union sought to establish was critical for resolving the ultimate issue in a representation case—whether a question of representation exists. The union may not be denied the right to litigate this fundamental issue at the representation hearing merely because the same facts would also establish an unfair labor practice in a different proceeding.

This analysis is confirmed by *Dayton Typographical Union, etc. v. N.L.R.B.*, 54 LRRM 2535 (App. D.C. No. 17,058) decided November 14, 1963, after the District Court had entered judgment in the present case. In *Dayton* this Court squarely held that a question of fact which was the subject of an unfair labor practice charge may thereafter

be litigated in a representation proceeding: " * * * If no complaint on the unfair practice charge [brought by the union] issues, the union will still be free to continue its picketing and may, in the proceedings on its petition for an election, bring to the attention of the Board the effect of the claimed unfair labor practices on the prospects of holding a free and fair election * * *" (Slip op. p. 28). If, as *Dayton* held, a union may demonstrate at a representation hearing that the employer committed unfair labor practices which make a free and fair election impossible, it must similarly be allowed to establish facts which, while also involving the commission of an unfair labor practice, establish that no election may be held because there is no "question of representation." After *Dayton*, the Board's *Times Square* policy may not be maintained, and the judgment below must be reversed.

B. The Board violated § 9(c)(1) by directing an election without a finding "upon the record of the hearing that such question of representation exists." A question of representation is not raised by a decertification petition fostered by an employer; at the hearing the union was not permitted to show that the petitions were thus fostered. Consequently, there was nothing in the record from which the Board could determine whether the petitions were employer-instigated and void or were the independent acts of the petitioners and properly raised a representation question. Thus, the Board's conclusion that a question of representation exists could not be based "upon the record" of the hearing.

In *Kearney & Trecker Corp. v. N.L.R.B.*, 209 F. 2d 782, 785 (C.A. 7), the Court construed § 9(c)(1) as follows: " * * * Thus, it appears self-evident that the Board in making a decision in a representation proceeding would be without authority, even if it desired to do so, to rely upon information which it or its employees might have received or obtained prior to and which resulted in causing it to pro-

vide for a hearing. This is so for the reason, as stated, that the Board is commanded to make its decision from what it finds 'upon the record of such hearing.' " By giving controlling effect to the General Counsel's disposition of the charge that the employer had fostered the petitions against the union and precluding the union from litigating the issue at the hearing, the Board did precisely what the Court in *Kearney & Trecker* held it was "without authority" to do.

The Board further violated § 9(c)(1) by directing an election without holding "an appropriate hearing." While the Board has a large measure of discretion in formulating procedures for representation hearings, this discretion is not absolute. A hearing which does not allow litigation of facts controlling the ultimate issue—whether a question of representation exists—is obviously not "appropriate" to its purpose. § 9 (c)(1) itself clearly distinguishes between matters which the Board may decide on the basis of an *ex parte* investigation, and those which must be litigable at the hearing. The adequacy of a union's interest showing need not be tried because § 9(c)(1) does not make it "an element in determining whether or not a question of representation exists." *N.L.R.B. v. J. I. Case Co.*, 201 F. 2d 597, 600 (C.A. 9). However, "a hearing is appropriate and necessary" with respect to issues on which the existence or non-existence of a representation question turns. *Id.* Such an issue is whether or not a decertification petition was fostered by the employer. It must therefore be tried at the hearing.

C. The Board's procedure in this case likewise denied the union "due process of law—using that term in its primary sense of an opportunity to be heard and defend its substantive right." *Brinkerhoff-Faris Trust and Savings Co. v. Hill*, 281 U.S. 673, 678. It was an essential element of the union's defense of its status as bargaining representative to show that the decertification petitions were

sponsored by the employer. The Board denied the union any opportunity to present this defense and thereby denied it due process of law.

The General Counsel's investigation of the charge was not a constitutionally adequate substitute for an opportunity to try the issue at the representation hearing. In this investigation the union was not given the opportunity to confront and cross-examine the General Counsel's informants. One of the relatively immutable principles in our jurisprudence is "that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue." *Greene v. McElroy*, 360 U.S. 474, 496. The courts have effectuated this principle repeatedly by striking down as unconstitutional governmental action taken in derogation of the right to meet opposing evidence. See, e.g., *Willner v. Committee on Character*, 373 U.S. 96; *Ohio Bell Telephone Co. v. Public Utilities Commission*, 301 U.S. 292; *Southern R. Co. v. Virginia*, 290 U.S. 190.

Greene v. McElroy, *supra*, was not itself decided on constitutional grounds. Rather, the Court followed a long series of cases in which "the Court has assumed that Congress intended to afford those affected by [governmental] action the traditional safeguards of due process" 360 U.S. at 507. The method of the *Greene* case is particularly appropriate in judging whether the Board has exceeded its authority, since the grant of a hearing and a decision "upon the record" in § 9(c)(1) is in furtherance of "the traditional safeguards of due process."

D. The Board's action herein was based entirely on *Times Square Stores Corp.*, 79 NLRB 361 and *Union Mfg. Co.*, 123 NLRB 1633. In *Times Square* the Board held

that the General Counsel's refusal to issue a complaint on an unfair labor practice charge forecloses consideration in a representation proceeding of the issues involved in that charge. This decision rests on a misunderstanding of Section 3(d) of the Act which vests in the General Counsel "final authority over the issuance and prosecution of complaints under Section 10." 79 NLRB at 365. While we of course agree that the Board may not review the General Counsel's refusal to issue a complaint, its taking of evidence probative of the existence or nonexistence of a question of representation does not constitute such review, even if the same evidence would support the finding of an unfair labor practice in a different proceeding. By misreading § 3(d) the Board has expanded the effect of the General Counsel's determinations beyond Section 10 proceedings, in derogation of the Board's own statutory and constitutional responsibility under Section 9 to provide parties to a representation proceeding with "an appropriate hearing" and findings "upon the record" there made.

The foregoing objections to the Board's *Times Square* policy are reinforced by an understanding of the nature of the General Counsel's responsibility in determining whether a complaint should issue. We have already observed that he conducts merely an *ex parte* investigation of a charge—a trial-type hearing is held only if a complaint issues. But it is also significant that the General Counsel's decision not to issue a complaint does not necessarily reflect a determination that an unfair labor practice has not been committed. "Even when a charge is filed, many factors must influence exercise by the General Counsel of this discretion relative to prosecution of unfair labor practices." *Radio Officers v. Labor Board*, 347 U.S. 17, 53.

When the General Counsel decides, for policy, budgetary or other reasons, not to issue a complaint although the facts would warrant an unfair labor practice finding, he is

exercising precisely the discretion granted him by § 3(d). The effect of the *Times Square* policy is thus to foreclose a party in the representation case from litigating an issue which may not have been decided in any prior proceeding. But "unless we can say that [there was] an adjudication of the merits, the doctrine of estoppel by judgment would serve an unjust cause: It would become a device by which a decision not shown to be on the merits would forever foreclose inquiry into the merits." *U. S. v. International Building Co.*, 345 U.S. 502, 506. This familiar rule is merely the corollary of the constitutional right to a fair hearing on any disputed relevant issue. *Brinkerhoff-Faris Trust and Savings Co. v. Hill*, 281 U.S. 673.

It is not clear whether the Board considers its *Times Square* rule to be compelled by § 3(d); it has not applied that rule with uniform rigor. Not until *Union Mfg. Co.*, 123 NLRB 1633, did it adopt its present "policy to exclude from decertification cases any evidence of employer participation in the institution of the proceeding * * *" *id.* at 1634. The Board there gave as an alternative ground for its new policy that "decertification petitions may be processed with a minimum of complication and delay." Mr. Justice Cardozo answered such administrative reasoning in *Ohio Bell Telephone Co. v. Public Utilities Commission*, *supra*: "The right to [a] full and fair hearing is one of the 'rudiments of fair play' assured to every litigant by the Fourteenth Amendment as a minimal requirement. There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored." 301 U.S. 292 at 304-305.

II.

The court below properly held that it had jurisdiction over this "suit to vacate a determination of the Board made in excess of its powers" (JA 21). *Leedom v. Kyne*, 358 U.S. 184; *Miami Printing Pressmen's Union, etc.*,—U.S. App. D.C. —, 322 F. 2d 993. However, the Court erred in denying the requested injunctive relief.

§ 9(c)(1) authorizes the direction of an election only "If the Board shall find upon the record of such hearing that such question of representation exists." Since the Board failed to comply with this express statutory requirement, its direction of election here was plainly "in excess of its delegated powers" and thus subject to injunction under *Leedom v. Kyne, supra*, at 188.

The District Court failed to deal with the "upon the record" issue. And it believed that the statutory requirement of "an appropriate hearing" was discretionary in nature. This view is untenable for it would empower the Board to direct an election regardless of the gravity of the procedural infirmities of the statutory hearing.

The constitutional inadequacy of the Board proceeding is, of course, an additional ground for the intervention of a federal court of equity. *Miami Printing Pressmen's Union, etc., supra*, 322 F. 2d at 996.

ARGUMENT

I. THE BOARD'S DECISION AND DIRECTION OF ELECTION WAS CONTRARY TO LAW.

A. The Issue Has Been Decided in *Dayton Typographical Union v. N.L.R.B.*

The Board's authority to conduct elections to decertify a recognized bargaining representative derives from Section 9(c)(1)(A)(ii) of the Act which provides as follows:

"(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees * * * (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in Section 9(a) * * * the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof."

If the decertification petition is initiated or sponsored by an employer "it is well settled that the petition by reason of such conduct cannot be said to have raised a question concerning representation" and must be dismissed without the holding of an election. *Sperry Gyroscope Corp.*, 136 NLRB 294, 297; see also *Twenty-seventh Ann. Report of the National Labor Relations Board*, p. 47 (G.P.O. 1963).⁷

⁷ This principle is based on the Board's interpretation of Section 9(c)(1)(A)(ii), that Congress has determined that only an employee may file such a petition. *Clyde J. Merris*, 77 NLRB 1375; *Gold Bond, Inc.*, 107 NLRB 1059.

At the representation hearing the union was denied any opportunity to prove that the employer had initiated and fostered the petitions; the election was thus directed without anything in the record to show whether the petitions properly raised a question of representation. In taking this action the regional director and the Board (by denying review of his decision) did not purport to depart from the settled interpretation of Section 9(c)(1)(A)(ii) that an employer-initiated petition is invalid. Nor did the Board treat as *res judicata* the General Counsel's refusal to issue a complaint on the union's unfair labor practice charge.⁸ Rather, the decision was made on the authority of Board cases which hold that because initiation and fostering of a decertification petition by an employer constitutes an unfair labor practice in addition to voiding the petition, such allegations may not be litigated in a representation proceeding. *Times Square Stores Corp.*, 79 NLRB 361; *Union Manufacturing Co.*, 123 NLRB 1633.

These Board decisions rest on a simple fallacy; they overlook the obvious truth that a single fact may be probative of more than one ultimate proposition (or "ultimate finding") from which legal consequences arise. Thus, the fact that "the employer has fostered a decertification petition" may establish the ultimate finding that the employer has violated one or more subsections of § 8(a) of the Act (and thus is subject to an appropriate remedy under § 10(c) of the Act); the same fact may also establish the ultimate finding that the decertification petition which he fostered does not raise a question of representation (and thus that no election may be held under § 9(c)(1) of the

⁸ We shall show below (pp. 29-31) that under accepted principles the General Counsel's determination, made after an *ex parte* investigation and in the exercise of a discretion to consider issues outside the merits of the charge, could not be treated as *res judicata*.

Act). Whenever the result of a proceeding⁹ depends upon the truth of a factual assertion, that assertion must be "litigable" in that proceeding if the conclusion is to have a rational basis in the record.

We need not elaborate this analysis, for in *Dayton Typographical Union, etc. v. N.L.R.B.*, U.S. App. D.C., F. 2d , 54 LRRM 2535 (No. 17,058, decided Nov. 14, 1963) this Court squarely held that a question of fact which was the subject of an unfair labor practice charge may thereafter be litigated in a representation proceeding.

In *Dayton* this Court said:

"A majority union may continue its recognitional picketing beyond the permitted reasonable period, not to exceed 30 days, if it files a timely petition for an election. If it also claims unfair labor practices on the part of the employer, it may file charges with the General Counsel of the Board. Whether or not the General Counsel chooses to issue a complaint on such charges, the union is protected. *If no complaint on the unfair practice charge is issued, the union will still be free to continue its picketing and may, in the proceedings on its petition for an election, bring to the attention of the Board the effect of the claimed unfair labor practices on the prospects of holding a free and fair election.* In such a case, the Board, if it considers that the unfair practices of the employer make a fair election impossible, would and should defer such election until it can be conducted in an atmosphere devoid of unfair pressures. On the other hand, if the General Counsel elects in his discretion to issue a complaint against the unfair labor practice of

⁹ That is, whether a particular order, for example a direction of election or dismissal of a petition, should be entered by the deciding tribunal. This elementary principle can be illustrated in many other contexts. For example, the fact "X" was driving his automobile at 65 miles an hour, may establish the proposition that "X" was in violation of the local police laws (and is therefore subject to criminal penalties) or alternatively, that "X" was negligent in his driving (and is therefore liable to "Y" who was injured by consequence of his negligence).

the employer, the petition for an election may, and in our view ordinarily should, be held in abeyance until the unfair practice charge is adjudicated and corrected." slip op., pp. 28-29, 54 LRRM at 2546 (emphasis supplied, footnotes omitted).

Thus, the Court fully recognized that even if the question whether the employer had committed certain unfair labor practices is passed on by the General Counsel in a proceeding to remedy unfair labor practices, it may be presented to the Board in a representation proceeding to determine whether a free and fair election may be held.¹⁰

We submit that *Dayton Typographical Union* is dispositive of this appeal. The existence of an opportunity for the union to demonstrate in the representation proceeding that the employer had committed unfair labor practices was deemed by the Court to be essential to preserve the constitutionality of § 8(b)(7). If the union may demonstrate that an employer has committed certain unfair labor practices in a representation proceeding in order to show that a free and fair election cannot be held, it must be allowed to establish facts, which while involving the commission of an unfair labor practice, would also show that no election may be held because there is no question of representation within the meaning of the statute. We cannot anticipate any possible distinction of the *Dayton* case which could be advanced by the appellees. The Board may not, in the light of that decision, adhere to its *Times Square* policy. The *Dayton* case thus compels reversal of the judgment below, which was entered before *Dayton* was decided. As we now show, this conclusion is likewise required by § 9(c)(1) of the Act and the Fifth Amendment of the Constitution.

¹⁰ The Court agreed with the Board's reasoning in *C.A. Blinne Construction Co.*, 135 NLRB 1153, that the promotion of free and fair elections to resolve representation disputes was one of Congress's objectives in enacting § 8(b)(7) whose construction and constitutionality were in issue in the *Dayton* case.

B. The Board Violated Section 9(c)(1) of the Act.**1. The Board's Decision Was Not "Upon the Record".**

§ 9(c)(1) empowers the Board to hold a representation election only after holding "an appropriate hearing upon due notice" and only if its "finds upon the record of such hearing that such question of representation exists". It is clear that the Board violated § 9(c)(1) because its decision was not based upon the record of the hearing: A decertification petition fostered by an employer does not raise a question of representation. *Sperry Gyroscope Corp.*, 136 NLRB 294. As the Court below found, and as is freely conceded, appellant union was not permitted to show at the representation hearing that the employer fostered the decertification petitions. Consequently, and this too is unchallenged, there was nothing in the record of the hearing from which the regional director or the Board could determine whether the decertification petitions were fostered by the employer and void or were independent acts of the petitioners which properly raised a representation question. Thus, the Board could not find "upon the record" of the hearing whether "a question of representation affecting commerce exists".

Our understanding of this requirement is fully confirmed by the construction of § 9(c)(1) in *Kearney & Trecker Corp. v. N.L.R.B.*, 209 F. 2d 782 (CA 7):

"This is the only statutory provision with which the Board need be concerned at the inception and during the progress of a representation proceeding. Of the numerous commands contained in this subsection, there are two which we regard as highly relevant to the question before us. They are (1) that the hearing officer 'shall not make any recommendations with respect thereto' (that is, the hearing which has been had), and (2) that the Board shall direct an election by a secret ballot and shall certify the results thereof if it 'finds upon the record of such hearing that such a question of

representation exists'. Thus, it appears self-evident that the Board in making its decision in a representation proceeding would be without authority, even if it desired to do so, to rely upon information which it or its employees might have received or obtained prior to and which resulted in causing it to provide for a hearing. .This is so for the reason, as stated, that the Board is commanded to make its decision from what it finds 'upon the record of such hearing'." 209 F. 2d at 785. (Emphasis supplied.)

In giving controlling effect to the General Counsel's disposition after investigation of the charge that the employer had fostered the decertification petitions and denying the union the right to litigate this issue at the representation hearing, the Board did precisely what the Court in *Kearney & Trecker* held it was "without authority" to do. There can be no doubt that the Board thereby failed to heed the command of § 9(c)(1) "to make its decision from what it finds 'upon the record of such hearing' ". *Kearney & Trecker Corp.*, *supra* at 785.¹¹ No decision of the Board has ever attempted to reconcile its *Times Square* policy with the mandate of § 9(c)(1). Although the "upon the record" requirement was the union's main statutory reliance below, defendants nowhere attempted to meet this point, and the District Court failed to discuss it in its opinion.

2. The Representation Hearing Was Not "Appropriate".

Not only did the Board exceed its powers by finding that a question of representation exists on the basis of matters outside the record of the representation hearing,

¹¹ It may well be asked, what would be the purpose of Congress in requiring a hearing as a condition to the holding of a representation election if the critical issue to be determined at the hearing (namely, the existence or nonexistence of a question of representation) can be determined on the basis of matters developed outside the hearing?

that hearing itself failed to meet the statutory requirement that it be "appropriate". While the Board has a large measure of discretion regarding the procedures to be followed in representation hearings, there comes a point where a proceeding so obviously does not fulfill the function of a "hearing" that it cannot be said to have been "appropriate". Evidence is required to be taken with respect to those issues which are in controversy. In a representation proceeding the issue to be litigated is whether "a question of representation affecting commerce exists", for the Board is empowered to direct an election only if it can answer that question affirmatively on the basis of the record of the hearing. But at the hearing here the union was not allowed to litigate this very issue, because it was not permitted to establish that facts existed which would, under the applicable law, conclusively negate the existence of a question of representation. § 9(c)(1) itself clearly distinguishes between matters which the Board may decide on the basis of an *ex parte* investigation, and those which it must allow to be litigated at the hearing.¹² The distinction was lucidly explained in *N.L.R.B. v. J. I. Case Co.*, 201 F. 2d 597 (CA 9). The Court there held that § 9(c)(1) allows the Board to treat the substantiality of a union's showing of interest as a matter of administrative concern alone.¹³ The Court made clear, however, that with respect to any matter which is "an element in determining whether

¹² The pertinent sentence of § 9(c)(1) reads " * * * the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice."

¹³ Accord: *National Labor Relations Board v. National Truck Rental Co.*, 99 U.S. App. D.C. 259, 262, 239 F. 2d 422, 425: "As to the showing of substantial employee interest by the petitioning unions prior to the election, there is no reason for permitting litigation of the issue by the parties; the purpose of the requirement is to make Board operations more efficient and compliance with the requirement is a matter solely for administrative determination."

or not a question of representation exists" there must be an evidentiary hearing:

"We see nothing in § 9(c)(1) purporting to make proof of substantial union interest an element in determining whether or not a question of representation exists. The section does not undertake to define the elements which are essential to such a determination. Naturally, as the statute indicates, the question of representation must be one 'affecting commerce,' else Board jurisdiction would not attach. Accordingly a hearing is appropriate and necessary in order to determine whether the employer is in commerce. The Board inquired into this matter at the hearing in this instance, and the question was settled by stipulation. The phrase 'such a question of representation', contained in the last sentence of subdivision (c)(1) and heavily stressed by the respondent, obviously refers back to the earlier phrase indicating that the question of representation must be one affecting commerce.

"Other matters, too, are appropriate subjects for inquiry at the representation hearing. One of these is whether a request for bargaining had in fact been made by the union, and denied or ignored by the employer. Another is whether there is any subsisting bargaining contract which would operate as a bar to an election." 201 F. 2d at 600.

Under the Board's decisions an element essential to determine whether or not a question of representation exists when such question is sought to be raised by a decertification petition, is whether or not the petition was initiated or fostered by an employer. Thus, under the reasoning of the Court in *J. I. Case*, "a hearing is appropriate and necessary" to try this issue.

We submit that the reasoning of the Court of Appeals in *J. I. Case* is entirely sound and should be followed here.¹⁴ In other areas the Supreme Court has held that

¹⁴ This Court cited *J. I. Case* with approval for its ultimate conclusion, that the showing of interest is not litigable, in *NLRB v. National Truck Rental Corp.*, 99 U.S. App. 259, 262, 239 F. 2d 422, 425.

the statutory requirement for a hearing is not fulfilled if the decision is made on the basis of evidence obtained outside the hearing. See, e.g., *I.C.C. v. Louisville and N. R. Co.*, 227 U.S. 88, 91; *Chicago Junction Case*, 264 U.S. 258, 265; *Morgan v. United States*, 298 U.S. 468, 480, and *Carter v. Kubler*, 320 U.S. 243, 247. *Carter* arose under § 75(s)(3) of the Bankruptcy Act, 11 U.S.C. § 2203(s)(3) which permits property valuations to be made by a conciliation commissioner. The Conciliation Commissioner held a hearing at which witnesses appeared but expressly based his finding not only on their testimony but on his personal investigation of the farm to be valued. The Supreme Court held that this action was improper.¹⁵ The procedures followed by the Board here are indistinguishable from those followed by the Commissioner in *Carter v. Kubler*. The Board too held a hearing, but like the Commissioner, based its determination of the ultimate question on evidence which the union had no opportunity to "examine or rebut." *Id.* at 247.

C. The Board Denied the Union Due Process of Law.

From what has already been said of the Board's proceedings it is clear that they not only failed to meet the statutory standards for a representation hearing but also denied to the union "due process of law—using that term in its primary sense of an opportunity to be heard and to defend its substantive right". *Brinkerhoff-Faris Trust and Savings Co. v. Hill*, 281 U.S. 673, 678. The decertification petitions brought into question before the Board the union's right to continue as the bargaining representative of Lawrence's employees and of the right of its members

¹⁵ " . . . [T]he personal investigation by the conciliation commissioner cannot be justified. It was apparently made without petitioner's knowledge or consent and no opportunity was accorded petitioner to examine or rebut the evidence obtained in the course of such investigation. The use of this evidence was therefore inconsistent with the right to a fair and full hearing." 320 U.S. at 247.

to continue to be represented by it. It was an essential element of the union's defense of its status to show that those decertification petitions were initiated or fostered by the employer. The Board's procedure denied the union "any opportunity to present its case and be heard in its support" (*Id.* at 681) and thereby denied it due process of law in violation of the Fifth Amendment.

The Board's constitutional duty was not satisfied by the General Counsel's *ex parte* investigation of the union's charge in the unfair labor practice proceeding. It is not disputed that this investigation followed the normal procedure, in which the charging party is not given the opportunity to confront and cross-examine the witnesses—sworn and unsworn—on whose information the General Counsel relied.¹⁶ In *Greene v. McElroy*, 360 U.S. 474, 496 the Supreme Court said:

"Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots."

¹⁶ We grant that Congress may predicate the availability of a new public remedy on the results of an *ex parte* investigation and the exercise of discretion by a government official. But the right of a union to continue as a bargaining representative, or of its members to be represented by their union, may not constitutionally be conditioned on the outcome of a proceeding in which the union is not allowed to confront and cross-examine adverse witnesses.

While *Greene v. McElroy* was not decided on constitutional grounds—a point to which we shall shortly recur—denial of this right has repeatedly been held to be a violation of due process. Only the other day, in *Willner v. Committee on Character*, 373 U.S. 96, the Supreme Court held that an applicant may not be denied admission to the bar without a hearing at which he can confront and cross-examine individuals who have given statements adverse to him. See also the cases cited in *Greene v. McElroy*, 360 U.S. at 497, particularly *Southern R. Co. v. Virginia*, 290 U.S. 190, and *Ohio Bell Telephone Co. v. Public Utilities Commission*, 301 U.S. 292. In *Ohio Bell*, Mr. Justice Cardozo, on behalf of a unanimous Court, held that a public utilities commission may not constitutionally order rate refunds “upon the strength of evidential facts not spread upon the record”, *id.* at 300. “What the Supreme Court of Ohio did was to take the word of the Commission as to the outcome of a secret investigation and let it go at that.” *id.* at 304. The Board here gave the same effect to the General Counsel’s secret investigation; its order likewise violates due process.

The unconstitutionality of the Board’s procedure bears heavily, of course, on the question whether it is authorized by statute. The grant of a hearing and a decision “upon the record” in § 9(c)(1) is in furtherance of the elemental notions of fair procedure which constitute due process of law. *Shields v. Utah Idaho Central R. Co.*, 305 U.S. 177, 182 and cases cited therein. *Greene v. McElroy*, 360 U.S. 474, is squarely in point:

“Where administrative action has raised serious constitutional problems, the Court has assumed that Congress or the President intended to afford those affected by the action the traditional safeguards of due process. See, e.g., *The Japanese Immigrant Case*, 189 U.S. 86, 101; *Dismuke v. United States*, 297 U.S. 167, 172; *Ex parte Endo*, 323 U.S. 283, 299-300; *American Power Co. v. Securities and Exchange Comm’n*, 329

U.S. 90, 107-108; *Hannegan v. Esquire*, 327 U.S. 146, 156; *Wong Yang Sung v. McGrath*, 339 U.S. 33, 49. Cf. *Anniston Mfg. Co. v. Davis*, 301 U.S. 337; *United States v. Rumely*, 345 U.S. 41. These cases reflect the Court's concern that traditional forms of fair procedure not be restricted by implication or without the most explicit action by the Nation's lawmakers, even in areas where it is possible that the Constitution presents no inhibition." 360 U.S. at 507-08.

In *Greene* the Court held that in the absence of explicit authorization from the President or Congress it would not infer that the Secretary of Defense has power to deprive an individual of a security clearance—and thereby a job—in a proceeding which did not provide the traditional safeguards of confrontation and cross-examination. The effect of a decertification of a union is to deny it representative status and to deny its members the right to have the union act as their bargaining representative. "These rights cannot be brushed aside as immaterial for they are the very essence of the rights which the Labor Relations Act was passed to protect." *Consolidated Edison Co. v. N.L.R.B.*, 305 U.S. 197, 238. The countervailing considerations of national security and the protection of military secrets on which the Government had relied in *Greene* are absent here. Thus, the constitutional requirement of a hearing is all the more evident and the Board's assertion of statutory authority to proceed to an election without such a hearing and without a decision upon the record is entirely impermissible.

D. The Board's Reasoning in *Times Square* is Unsound.

As we have noted earlier, the Board's action herein rested entirely on the authority of its own decisions in *Times Square Stores Corp.*, 79 NLRB 361 and *Union Manufacturing Co.*, 123 NLRB 1623. (See JA 11, n. 3). The Board held in *Times Square* that the General Counsel's refusal to issue a complaint on an unfair labor practice

charge forecloses consideration in a representation proceeding of the issues involved in that charge. It is appropriate that we set out the Board's reasoning on this issue in full:

"Section 9(c) of the Act vests the Board itself with authority to direct elections in representation proceedings and to certify the results thereof. In exercising such authority, the Board is not circumscribed by any limitations except those specifically described in the Act or in the Rules and Regulations it has issued pursuant thereto. However, Section 3(d) of the Act, as amended, provides that the General Counsel 'shall have *final authority*, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under Section 10, and in respect of the prosecution of such complaints before the Board.' (Emphasis added.) The Congressional Conference Report explains this provision by stating that the General Counsel is to have 'the final authority to act in the name of, but independently of any direction, control, or review by, the Board in respect of the investigation of charges and the issuance of complaints of unfair labor practices, and in respect of the prosecution of such complaints before the Board.'

"It is clear, therefore, that the Board may not review the General Counsel's administrative dismissals of unfair labor practice charges, regardless of the grounds for his action. When he refuses to entertain unfair labor practice charges, the General Counsel's action is final and binding on the Board. Congress evidently intended this and we shall, of course, govern ourselves accordingly. Yet it is still the Board, and not the General Counsel, that has exclusive jurisdiction over representation proceedings; proceedings on objections and challenges are unquestionably part of the investigation concerning a question of representation. The issue then arises: May the Board make its own determinations, from the facts presented in a representation case record, as to whether a strike was an unfair labor practice strike, not for the purpose of administering Sections 8 or 10 of the Act, but in order to dispose of challenges as part of its responsibility under Section 9(c)?

"We are constrained to answer this question in the negative. The Act, as written, compels this conclusion. To hold otherwise would not be consistent with the Congressional intent to endow the General Counsel with *final authority* over the issuance and prosecution of complaints under Section 10. It would, in addition, create the undesirable situation of the Board's acting in practice as a forum for considering the content of charges which the General Counsel, for reasons satisfactory to himself, has thought it proper to dismiss." 79 NLRB at 364-365 (emphasis in original).

The precise result in *Times Square* was that the Board conclusively presumed that strikers are "economic strikers" rather than "unfair labor practice strikers" unless the strike has been determined to be an unfair labor practice strike in a complaint proceeding.¹⁷ The Board did not originally extend the *Times Square* rule to foreclose litigation of the question whether an employer had initiated or instigated the filing of a decertification petition. See e.g., *Morganton Full Fashioned Hosiery Co.*, 102 NLRB 134; *Gold Bond Inc.*, 107 NLRB 1059; *Consolidated Blenders Inc.*, 118 NLRB 545. However, these cases were overruled by the Board in the *Union Manufacturing* case:

"We have carefully considered and reappraised the relative advantages and disadvantages of retaining, as an exception to the general rule, the practice of allowing issues of employer instigation of, or assistance in, the filing of the decertification petition to be litigated in the representation proceeding. It is our opinion that the same factors which weigh against permitting litigation of unfair labor practice matters in other types of representation cases are present, and should likewise prevail, in decertification cases. If there is a basis for alleging employer responsibility for the filing of a decertification petition, the Board's complaint procedures provide a forum in which such an

¹⁷ This issue is relevant in a representation proceeding because the respective voting eligibility of strikers and their replacements turns on the nature of the strike.

issue may be properly litigated, and an appropriate remedy obtained. At the same time, valid decertification petitions may be processed with a minimum of complication and delay. Accordingly, we herein enunciate the Board policy to exclude from decertification cases any evidence of employer participation in the institution of the proceeding, whether the alleged evidence pertains to showing of interest or to employer responsibility for the filing of the petition." 123 NLRB at 1634.

We submit that the reasons stated by the Board in support of its policy are unsound. The Board's principal reliance in *Times Square* was on the General Counsel's "final authority over the issuance and prosecution of complaints under Section 10". 79 NLRB at 365 (Board's emphasis). We, of course, do not dispute that § 3(d) grants such "final authority". But this means merely that the General Counsel, as the prosecuting official under the separation of function mandated by the 1947 Amendments is not subject to the control of the Board in determining whether a complaint should issue.¹⁸ See, e.g., *Houriha v. N.L.R.B.*, 91 U.S. App. D.C. 316, 301 F. 2d 187; *International Union of Electrical Radio, and Machine Workers v. N.L.R.B.*, 110 U.S. App. D.C. 91, 289 F. 2d 757; *Dunn v. Retail Clerks*, 307 F. 2d 285, 288 (CA 6). Thus, a charging party cannot obtain the remedies provided by § 10 unless the General Counsel chooses to issue a complaint. For the Board to treat as controlling in a § 9 proceeding the General Counsel's decision in processing a charge expands the effect of the General Counsel's action to an area from

¹⁸ "Final" is a legal term whose inherent "ambiguity" (*Heikkila v. Barber*, 345 U.S. 229, 233) particularly cautions against the "tendency to assume that a word which appears in two or more legal rules, and so in connection with more than one purpose, has, and should have precisely the same scope in all of them * * *". Cook, *The Logical and Legal Bases of the Conflict of Laws*, 159, quoted in *Civil Aeronautics Board v. Delta Air Lines*, 367 U.S. 316 at 328.

which he was excluded. The Board retains exclusive jurisdiction over representation proceedings (as was recognized in *Times Square*); and the 1947 Act did not relieve it of its responsibility to determine all issues in such a proceeding and to follow the procedures prescribed in Section 9. The Board has simply failed to read Section 3(d) in light of the statutory and constitutional requirements of an appropriate hearing and a decision upon the record.

We have already seen that the procedures properly followed by the General Counsel in investigating a charge under § 10 are not an adequate substitute for the hearing required by § 9 and the Constitution, since a trial-type hearing is held only if a complaint issues. Moreover, the General Counsel's decision not to issue a complaint is not necessarily an adjudication on the legal and factual basis of the charge. The General Counsel has broad discretion in determining whether or not to issue a complaint. "The Board [now the General Counsel] has wide discretion in the issue of complaints * * * It is not required by the statute to move on every charge. It is merely enabled to do so." *Labor Board v. Indiana and Michigan Electric Co.*, 318 U.S. 9, 18-19. "Even when a charge is filed, many factors must influence exercise by the General Counsel of this discretion relative to prosecution of unfair labor practices." *Radio Officers v. Labor Board*, 347 U.S. 17, 53. In *Haleston Drug Stores v. N.L.R.B.*, 187 F. 2d 418 (CA 9), the Court said: "The Board itself [before the Taft-Hartley Amendments], without judicial challenge, acted on the assumption that it could, for reasons of policy or for budgetary or other reasons, decline to issue an unfair labor practice complaint, or to dismiss a complaint after issuance without determining the existence of an unfair labor practice, if in its reasoned judgment the policies of the act would be best served by that course. Of this assumption and practice one can not doubt that Congress was fully cognizant. * * * In the complaint stages

of an unfair labor practice proceeding, the exercise of jurisdiction appears clearly discretionary. The language of § 10(b), as well as the judicial interpretation given the Act, so indicates. Despite the Act's broad coverage, authority obviously resides in the general counsel to refrain from issuing a complaint even though legal jurisdiction exists." *Id.* at 421-22. See also, *San Diego Unions v. Garmon*, 359 U.S. 236, 245-246; *Hourihan v. N.L.R.B.*, 91 U.S. App. D.C. 316, 201 F. 2d 187; *International Union of Electrical, Radio, and Machine Workers v. N.L.R.B.*, 110 U.S. App. D.C. 91, 289 F. 2d 757; *Dunn v. Retail Clerks*, 307 F. 2d 285, 288 (CA 6); *Local Union No. 12 v. N.L.R.B.*, 189 F. 2d 1, 3-5 (CA 7); Cf. *Dayton Typographical Union No. 57 etc. v. N.L.R.B.*, U.S. App. D.C. , F. 2d , slip op. p. 28, 54 LRRM at 2546, text and note at n. 24. When the General Counsel decides that it would not effectuate the purpose of the Act to seek a Section 10 remedy against a purported offender, or to expend the resources of his office in a particular case, he is exercising precisely the discretion with which he is vested by § 3(d). *Division 1267, etc. v. Ordman*, U.S. App. D.C. , 320 F. 2d 729, 730, and cases cited, *supra*. Thus, a refusal by the General Counsel to issue a complaint does not necessarily reflect a determination that the alleged unfair labor practice has not been committed. To foreclose a party in one proceeding from litigating an issue which was not necessarily decided in any prior proceeding is contrary to accepted legal principles. A decision may conclude the parties "only as to those matters in issue or otherwise controverted, upon the determination of which the finding or verdict was rendered." *Cromwell v. County of Sac*, 94 U.S. 341, 353; *Commissioner v. Sunnen*, 333 U.S. 591, 598. For "unless we can say that [it was] an adjudication of the merits, the doctrine of estoppel by judgment would serve an unjust cause: it would become a device by which a decision not shown to be on the merits would forever foreclose inquiry into the merits." *United States v. Interna-*

tional Building Co., 345 U.S. 502, 506. This rule, which has been frequently reiterated,¹⁹ is merely a corollary of the right to a fair hearing on any disputed relevant issue.²⁰ The right is thus of constitutional dimension. See e.g., *Postal Telegraph-Cable Co. v. Newport*, 247 U.S. 464, 475-476, cited with approval in *Brinkerhoff-Faris Trust and Savings Co. v. Hill*, 281 U.S. 673 at 682.

Nor may the Board treat the General Counsel's determination as controlling as a matter of comity between him and the Board. In the first place, comity cannot require that a determination be given greater effect than it was designed to have. The General Counsel might have come to an entirely different conclusion if he were to determine whether a decertification election should be held under the circumstances—a matter which, however, he does not consider because he is not authorized to do so. Moreover, the allocation of responsibility between the Board and the General Counsel is, with exceptions not here relevant,²¹ a subject on which Congress has spoken; the Board may not substitute its own judgment and thereby escape its responsibility to decide relevant issues in a representation proceeding. Most important, however, "due process requires that no other jurisdiction shall give effect, even as a matter of comity, to a judgment elsewhere acquired

¹⁹ E.g., *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 157-58; *Yates v. United States*, 354 U.S. 298, 335-38; *Lawlor v. National Screen Service*, 349 U.S. 322, 326-29.

²⁰ "To hold otherwise might well prevent a hearing or a determination on the merits even though there had not been a hearing or determination in the first case." *Happy Elevator No. 2 v. Osage Construction Co.*, 209 F. 2d 459, 461 (CA 10).

²¹ § 3(d) also provides that the General Counsel "shall have such other duties as the Board may prescribe or as may be provided by law." Under this authority the Board has delegated some of its functions to the General Counsel, for example, the conduct of litigation.

without due process". *Griffin v. Griffin*, 327 U.S. 220, 229. In short, the Constitution requires that a party be given at least one opportunity to be heard in defense of a substantive right. *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, *supra*.

It is not altogether clear whether the Board considers its *Times Square* rule to be mandated by Section 3(d), or to be merely discretionary.²² It has not extended *Times Square* to the limit of its illogic (see pp. 15-17, *supra*) by consistently excluding from consideration in representation proceedings any matters which may involve the litigation of unfair labor practices.²³ Indeed, it did not apply the rule to exclude consideration of employer initiation of unfair labor practices until 10 years after *Times Square*, when *Union Manufacturing* was decided.²⁴

²² In the Court below defendants argued: "The issue here is not, as plaintiff suggests (Memorandum, pp. 17-18), whether the Board's policy is required by Section 3(d). Cf. *Local 1545, Carpenters v. Vincent*, 286 F. 2d 127, 131 (C.A. 2). The point is simply that it was a reasonable exercise of administrative discretion for the Board to adopt and follow its present policy in the interest of promoting administrative consistency while protecting the separation of powers specifically provided for in the statute." (Memorandum in Support of Defendant's Motion to Dismiss, Etc., pp. 13-14).

²³ For example, when a contract is asserted as a bar in a representation proceeding, the Board allows the petitioner to show that the contract contains an unlawful security clause (*Paragon Products Corp.*, 134 NLRB 662), but not that the incumbent union is employer-assisted, *Bi-States Co.*, 117 NLRB 86. As the District Court found (JA 27), the Board allowed the union here to litigate whether the decertification petitioners were supervisors, although such finding may itself be considered evidence of an unfair labor practice. It is paradoxical as well as unjust to deprive a union of an opportunity to litigate an issue which may affect its right to continue as a representative *precisely because* it has been the victim of an unfair labor practice.

²⁴ See cases cited at p. 27, *supra*.

In *Union Manufacturing Co.* the Board stated in support of "the Board policy" there enunciated that "valid decertification petitions may [thereby] be processed with a minimum of complication and delay". 123 NLRB at 1634. One would have thought that this approach to administrative adjudication had been finally scuttled by Mr. Justice Cardozo in *Ohio Bell Telephone Co. v. Public Utilities Commission*, 301 U.S. 292, 304-05: "The right to [a full and fair] hearing is one of the 'rudiments of fair play' assured to every litigant by the Fourteenth Amendment as a minimal requirement. There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored."

II. THE COURT BELOW SHOULD HAVE GRANTED INJUNCTIVE RELIEF.

Defendants contended below that the District Court was without jurisdiction. This contention was properly rejected on the authority of *Leedom v. Kyne*, 358 U.S. 184 and *Miami Printing Pressmen's Union v. McCulloch*, U.S. App. D.C. , 322 F. 2d 993 (JA 21-22). However, the Court denied injunctive relief:

"This policy [as enunciated in *Union Mfg. Co.*, 123 NLRB 1633] appears to be sound and it certainly does not contravene the dictates of Congress to conduct an "appropriate hearing" in representation cases. This is a discretionary matter and is unlike *Leedom v. Kyne*, which rested on a "specific prohibition in the Act", *supra* at 188.

"It is the opinion of this court that the Board has conducted this hearing within the requirements of section 9(c) of the Act." (JA 23).

We do not agree that the statutory direction to hold an appropriate hearing "is a discretionary matter". Congress was quite specific in mandating that the Board "shall provide for an appropriate hearing upon due notice" (em-

phasis supplied) before an election is directed. Under the ruling of the Court below the Board would be empowered to direct an election regardless of the gravity of the procedural infirmities of the hearing which § 9(c)(1) dictates. Here, as we have already shown, the hearing was plainly not "appropriate", since it failed to provide for litigation of the critical disputed issue of fact. Thus, the union was entitled to have the resulting direction of election set aside.

This point need not be decided, however, because the Board's other demonstrated violation of § 9(c)(1)—which the District Court apparently failed to consider—can under no circumstances be treated as a mere abuse of discretion, and is clearly within *Leedom v. Kyne*, 358 U.S. 184. § 9(c)(1) empowers the Board to direct an election *only* "If the Board finds upon the record of such hearing that such question of representation affecting commerce exists." We have shown that the Board's finding here was not made "on the record" of the hearing. Its direction of election was therefore "in excess of its delegated powers" and thus subject to injunction by the federal courts. *Leedom v. Kyne*, 358 U.S. 184, 190; *McCulloch v. Sociedad Nacional*, 372 U.S. 10, 16-17; *Miami Newspaper Printing Pressmen's Union v. McCulloch*, — U.S. App. D.C. —, —, 322 F. 2d 993, 996-997.

The power of the federal courts to grant relief must be recognized *a fortiori* where, as here the direction of election results also from denial of a constitutional right. *Miami Printing Pressmen's Union, etc., supra*, 322 F. 2d at 996; *Fay v. Douds*, 172 F. 2d 720 (CA 2).

²⁵ Since *Leedom v. Kyne* clearly covers this case if our position on the merits is sound, we have not discussed alternative grounds for invoking federal equity jurisdiction. It should be observed, however, that limitations on judicial review of a certification of representatives cannot be uncritically applied where review of a *decertification* is sought, in view of the special consequences of decertification, see, e.g., *Retail Clerks, etc. v. Montgomery Ward*, 316 F. 2d 754 (CA 7).

CONCLUSION

The judgment below should be reversed with instructions to declare the Board's Direction of Election null and void, and to enjoin further proceedings pursuant to said Direction of Election.

Respectfully submitted,

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APPENDIX A**Constitutional and Statutory Provisions Involved****U. S. CONSTITUTION:**

Amendment V: "No person shall be * * * deprived of life, liberty, or property, without due process of law * * *"

NATIONAL LABOR RELATIONS ACT, as amended (61 Stat. 136, 29 U.S.C. § 141 *et seq.*):

Section 3(d) provides in pertinent part as follows:

"There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than trial examiners and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law."

Section 9(c)(1) provides as follows:

"Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a); the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof."



BRIEF FOR APPELLEES

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,247

LAWRENCE TYPOGRAPHICAL UNION, affiliated with INTER-
NATIONAL TYPOGRAPHICAL UNION, AFL-CIO, APPELLANT

v.

FRANK W. McCULLOCH, ET AL., individually and as mem-
bers of and constituting the NATIONAL LABOR RE-
LATIONS BOARD, APPELLEES

On Appeal From An Order of the United States
District Court for the District of Columbia

ARNOLD ORDMAN,
General Counsel,

United States Court of Appeals DOMINICK L. MANOLI,
for the District of Columbia Circuit *Associate General Counsel,*

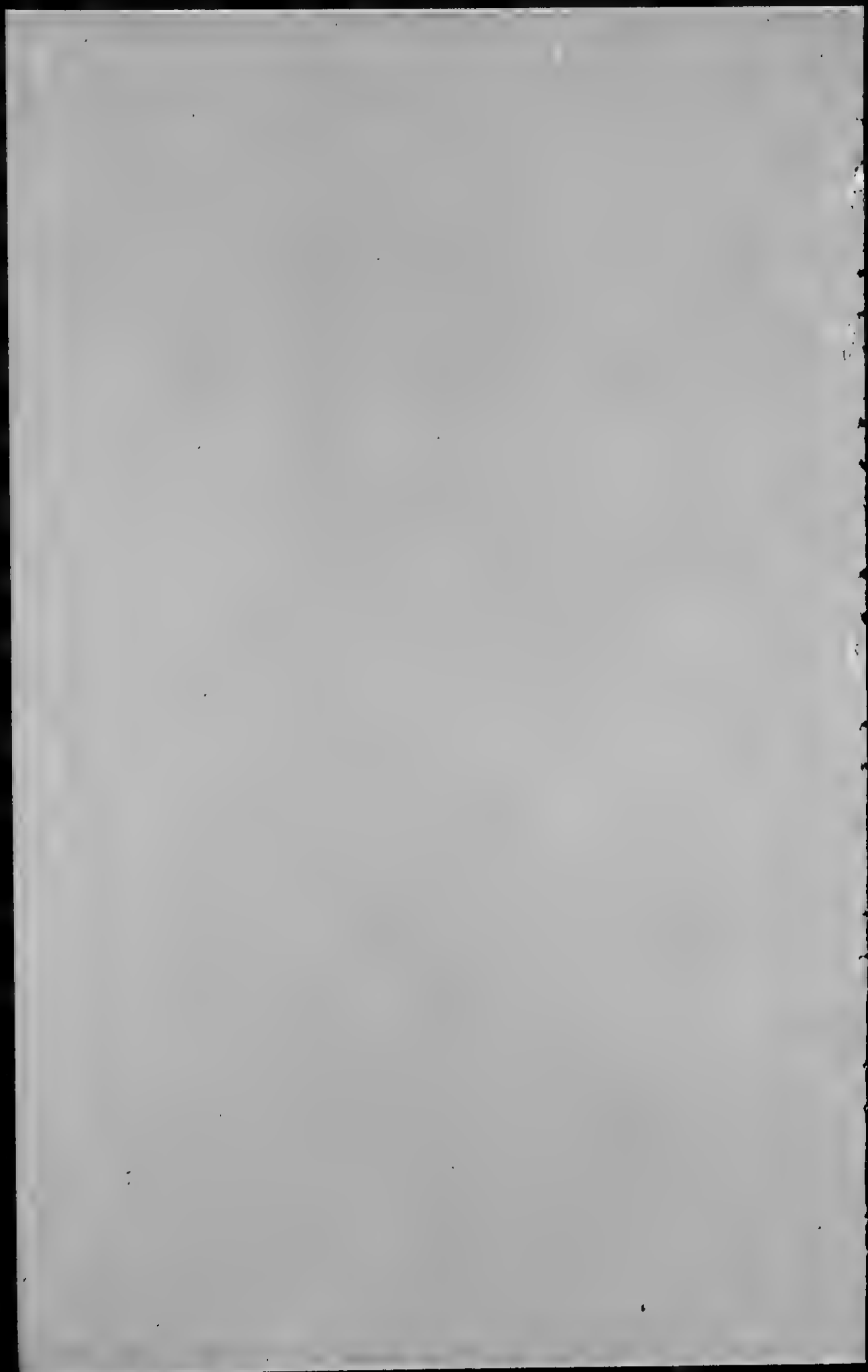
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STATEMENT OF QUESTION PRESENTED

Whether the District Court properly concluded that the Board did not violate a mandatory prohibition of the National Labor Relations Act or a guarantee of the due process clause of the Constitution in refusing to permit appellant to litigate in a representation proceeding unfair labor practice issues that were before the General Counsel upon a charge filed by appellant.

III

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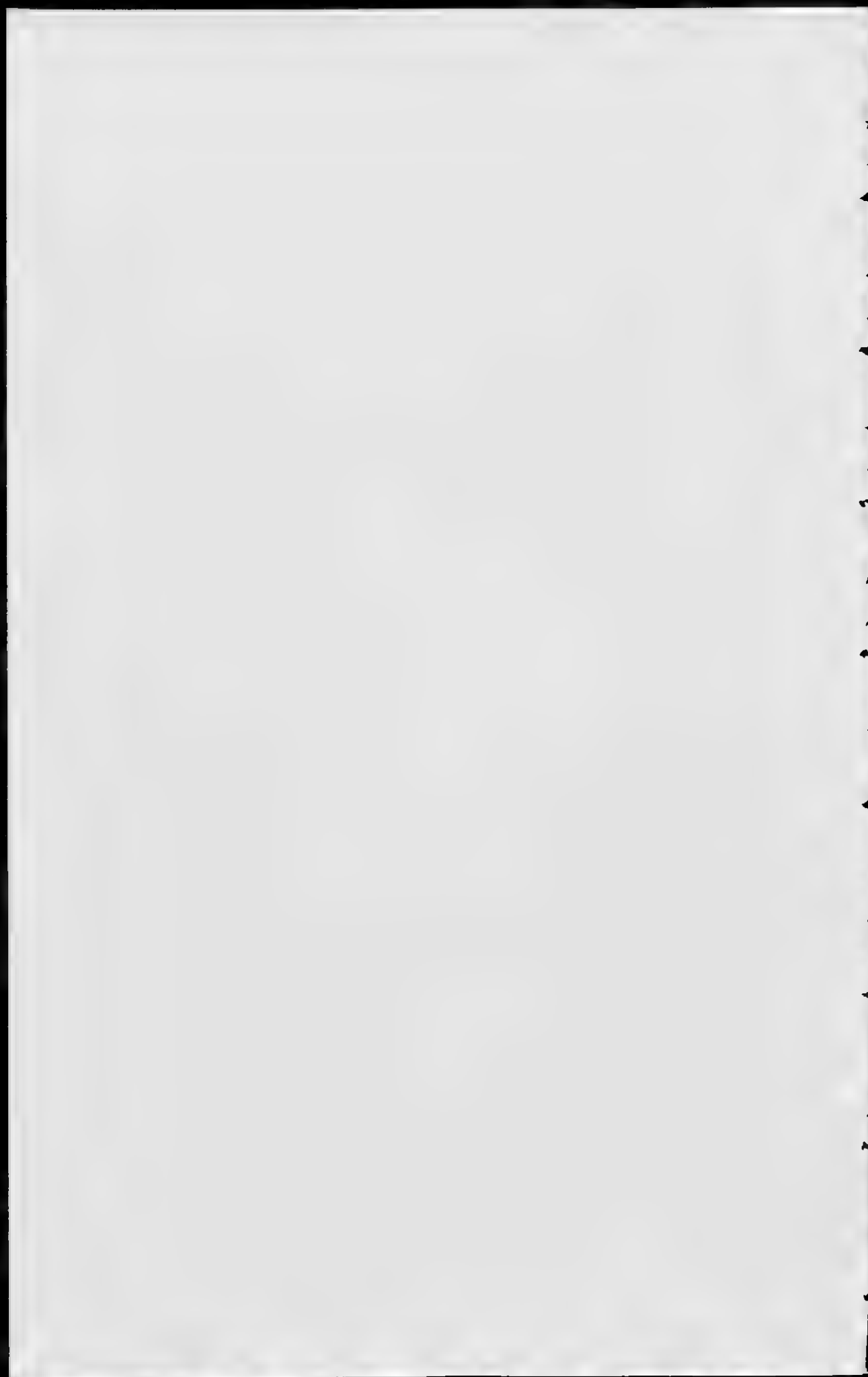
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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,247

**LAWRENCE TYPOGRAPHICAL UNION, affiliated with INTER-
NATIONAL TYPOGRAPHICAL UNION, AFL-CIO, APPELLANT**

v.

**FRANK W. McCULLOCH, ET AL., individually and as mem-
bers of and constituting the NATIONAL LABOR RE-
LATIONS BOARD, APPELLEES**

**On Appeal From An Order of the United States
District Court for the District of Columbia**

BRIEF FOR APPELLEES

JURISDICTIONAL STATEMENT

This is an appeal from an order of the United States District Court for the District of Columbia, denying appellant's motion for a preliminary injunction and cross-motion for summary judgment and granting appellees' motion for summary judgment (J.A. 28-29).¹ The com-

¹ "J.A." refers to the portions of the record printed as a joint appendix to the briefs.

plaint seeks to have the Board and its agents enjoined from conducting an election among the composing and mailing room employees of Kansas Color Press, Inc., to determine whether they choose to retain appellant as their collective bargaining representative under the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. Secs. 151, *et seq.*² The complaint also seeks to have the Decision and Direction of Election, under which such an election was scheduled, declared null and void. The jurisdiction of this Court is invoked under 28 U.S.C. 1292 (1) and 1294.

COUNTERSTATEMENT OF THE CASE

The undisputed facts, as set forth in the findings of the District Court, and the pleadings and exhibits below, may be summarized as follows:

Appellant is an unincorporated labor organization that for many years was recognized as the collective bargaining representative of the composing and mailing room employees of Kansas Color Press, Inc., at its manufacturing plant in Lawrence, Kansas (J.A. 26). The last of a series of contracts covering these employees expired on May 31, 1961 (J.A. 26). When subsequent negotiations for a new contract proved unsuccessful, appellant, on September 19, 1961, called a strike and established a picket line at the plant (J.A. 26). Kansas Color Press continued operations by hiring new employees to replace the strikers while appellant continued to maintain the picket line, which it is maintaining now, some 2 years later (J.A. 26).

In January 1963, more than a year after the strike's inception and the replacement of the strikers, employees currently in the composing and mailing rooms filed petitions pursuant to Section 9(c)(1)(A)(ii) of the Act, under which employees, or any individual or labor organization acting in their behalf, may "assert

² Relevant provisions of the Act are set forth, *infra*, pp. 44-49.

that . . . the labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative" no longer has the support of a majority of the employees in the unit (J.A. 26). Shortly thereafter appellant filed a charge with the Regional Director for the Board's Seventeenth Region alleging a variety of unfair labor practices, including employer initiation and fostering of the decertification petitions (J.A. 26-27). The Regional Director, acting on behalf of the General Counsel, conducted an investigation of this charge, pursuant to Section 3(d) of the Act and Section 101.4 of the Board's Statements of Procedure. On the basis of the evidence uncovered in this investigation, the Regional Director determined that the unfair labor practice allegations were without merit and, accordingly, advised appellant, on March 26, 1963, that the Regional Office would not issue a complaint based on the charge (J.A. 27). Appellant thereafter filed an appeal with the General Counsel from the Regional Director's refusal to issue a complaint (J.A. 27).

In the meantime, the Regional Director, acting on behalf of the Board, conducted an investigation of the decertification petitions, pursuant to Sections 9(c) and 3(b) of the Act and Section 101.18 of the Board's Statements of Procedure (J.A. 27). The Regional Director concluded, on the basis of this investigation, that there was "reasonable cause to believe that a question of representation affecting commerce exist[ed]" and, accordingly, provided for a representation hearing, on due notice to the parties (Section 9(c)(1) of the Act).

This hearing was conducted on May 7, 1963, before a hearing officer designated by the Regional Director (J.A. 5, 27). In the course of the hearing, appellant moved for the production and incorporation into the record of all statements and reports in the files of the Regional Office concerning its investigation of appellant's unfair labor practice charge (J.A. 27). In addition, appellant offered to prove at the representation hearing that Kansas Color Press had engaged in the unfair labor prac-

tices alleged in the charge (J.A. 27). The hearing officer denied the motion and refused the offer of proof on the ground that these unfair labor practices issues could not be litigated in the representation hearing (J.A. 11 n. 3, 27).

On June 7, 1963, the Regional Director issued a Decision and Direction of Election in which he affirmed the hearing officer's denial of appellant's motion and offer of proof, stating that under settled Board precedent, "unfair labor practice allegations are not properly litigable in a representation proceeding" (J.A. 11, n. 3). On the basis of the record compiled in the representation hearing, the Regional Director concluded that "[a] question affecting commerce exists concerning the representation of certain employees of the Employer, within Section 9(c) (1) and Section 2(6) and (7) of the Act" (J.A. 14). Pursuant to Section 9(c) (1) and 3(b) of the Act, he accordingly directed that an election be held in a single unit of composing and mailing room employees (J.A. 15).

Appellant appealed to the Board from the Decision and Direction of Election, challenging the Regional Director's action in directing an election without first affording the Union an opportunity to litigate at the representation hearing the issue of the employer's alleged initiation and fostering of the decertification petitions (J.A. 28). On June 23, 1963, the Board denied the appeal on the ground that it raised "no substantial issues warranting review" (J.A. 16).

In the following month, on July 17, 1963, the General Counsel acted on appellant's appeal from the Regional Director's refusal to issue a complaint on the unfair labor practice charge, affirming that refusal as to each of the violations alleged (J.A. 18-19). In each instance, the General Counsel's affirmance was based on substantive legal or factual holdings and did not depend on budgetary or policy considerations (J.A. 18-19). With respect to appellant's contention that the Company had initiated or fostered the decertification petitions, in violation of

Section 8(a) (1) and (2) of the Act, the General Counsel stated that it had been "concluded that the evidence was insufficient to establish" this allegation (J.A. 18).

Appellant instituted its action to restrain the election and to invalidate the Decision and Direction of Election in the District Court on August 2, 1963 (J.A. 2). On August 23, 1963, a hearing was held on appellant's motions for a preliminary injunction and summary judgment in its favor and on appellees' motion to dismiss the complaint or, in the alternative, for summary judgment in their favor (J.A. 26, 9, 17). On August 28, 1963, the Board's Regional Office, with the court's consent and without objection by appellant, conducted the scheduled decertification election and impounded the ballots, pending the District Court's disposition of the case (Un. Br. 5, n. 6).

On October 3, 1963, the District Court issued its Memorandum and Order denying appellant's motions for a preliminary injunction and summary judgment and granting the Board's motion for summary judgment on the grounds that the Board's "policy appears to be sound and . . . does not contravene the dictates of Congress" but is, on the contrary "a discretionary matter" for the Board (J.A. 23). And on November 1, 1963, the Court entered its Findings of Fact, Conclusions of Law and Order, holding that the representation determinations complained of were within the wide area of the Board's discretion in such matters and violated neither a mandatory prohibition of the National Labor Relations Act nor the due process clause of the Constitution (J.A. 26-29).

The Board's Regional Office thereafter proceeded to tabulate the election results. A total of 68 ballots were cast: 34 by striker replacements or returned strikers, which appellant challenged, and 34 by unreturned strikers, which the employer challenged. Since all the ballots were challenged, none was opened or counted. Appellant also filed timely objections to the election, pursuant to Section 102.69 of the Board's Rules and Regulations.

On January 29, 1964, the Regional Director issued a Supplemental Decision and Order in which he found the various objections of appellant to the election to be without merit; sustained the challenges to the ballots of the unreturned strikers; overruled the challenges to the ballots of the striker replacements and returned strikers, currently working in the unit; and directed that these ballots be opened and counted and a certification issued on the results.³ No final action has been yet taken on this direction.

SUMMARY OF ARGUMENT

The District Court properly refused to set aside the Board's representation determination. *Leedom v. Kyne*, 358 U.S. 184, established a limited exception to the still valid general rule that Board representation determinations are not subject to direct review in the district courts. Appellant's assertion that the instant case comes within that exception because the representation determination clearly violates a mandatory direction of the statute or a procedural guarantee of the Constitution is without merit.

On its face, no clear violation of a statutory command is made out by the allegation that the representation hearing provided by the Board was not "appropriate" within the meaning of Section 9(c)(1) of the Act. Nor did the Board determine the existence of a question of representation on facts outside "the record" of the hearing, in violation of Section 9(c)(1). Rather, the Board refused, in making the representation determination, to pass on an issue that it deems appropriately handled only under unfair labor practice procedures and that was, in fact, then before the General Counsel on appeal from the Regional Director's refusal to issue a complaint on appellant's unfair labor practice charge. Far from being contrary to a mandatory prohibition of the statute, this

³ The Supplemental Decision and Order is reprinted, *infra*, pp. 50-62, as an appendix to this brief.

adjustment of remedies and procedures within the agency to reduce duplication and promote consistency is necessarily a matter for administrative discretion and thus lies beyond the limited purview of district court jurisdiction in representation matters.

Appellant fares no better with its allegation that the Board's refusal to permit litigation of the allegations of employer initiation and fostering of the decertification petitions in the representation proceeding violated the due process clause of the Constitution. It is well settled that the "Fifth Amendment does not require a trial-type hearing in every conceivable case of government impairment of private interest"; for the imposition of sweeping and rigid hearing requirements "would do violence to . . . the constitutional power of Congress to devise differing administrative and legal procedures appropriate for the disposition of issues affecting interests widely varying in kind." *Cafeteria & Restaurant Workers Union, Local 473 v. McElroy*, 367 U.S. 886, 894; *Federal Communications Commission v. WJR*, 337 U.S. 265, 275, 276.

Appellant acknowledges that a charging party has no right to a hearing on whether a complaint should issue based on its charges, but attempts to distinguish that case from this on the ground that an unfair labor practice proceeding involves simply the "availability of a new public remedy," whereas the instant representation proceeding could result in appellant's loss of status as majority representative and, therefore, allegedly requires a trial-type hearing on all relevant issues. Contrary to appellant's contention, representation proceedings are quite as much in the public interest as unfair labor practice proceedings and the private interests incidentally involved in the latter are as great, or greater, than those in the former.

The primary aim of Section 9 of the Act is the prevention of industrial unrest through the provision of machinery for promptly and accurately registering the employees' free choice; the interest of unions or employers in the expression of that choice has little significance

under the statutory scheme—a scheme whose constitutionality is well settled. Indeed, insofar as appellant contends that Congress could not constitutionally conduct a representation election without first permitting all parties to litigate every issue relevant to the existence of “a question of representation affecting commerce,” its claim is refuted by the decision of the Ninth Circuit in *Department & Specialty Store Employees’ Union, Local 1265 v. Brown*, 284 F. 2d 619, 628 (C.A. 9), upholding the constitutionality of Section 8(b)(7)(C) of the Act which authorizes the Board to conduct elections under certain circumstances without holding any hearing at all.

Finally, assuming *arguendo* the existence of jurisdiction in the court below, appellant’s action was properly dismissed on the ground that the procedure followed by the Board here was a valid exercise of administrative discretion. Support for that procedure is provided by Section 3(d) of the Act, for it adds to considerations of administrative consistency and efficiency, a statutory scheme for separation of powers within the agency, under which the General Counsel is given “final authority” with respect to the investigation of unfair labor practice charges and the issuance of complaints if the charges are found to have merit. Thus, it would be inconsistent with the General Counsel’s authority under the statute, if the Board were now to permit litigation in a representation proceeding of factual allegations that the General Counsel found so lacking in evidentiary support, he declined even to issue a complaint and go to hearing on them. *Times Square Stores Corp.*, 79 NLRB 361, 364-365.

Contrary to appellant, this view of Section 3(d), as applied to the procedure followed in the instant case, is not contradicted by the decision in *Dayton Typographical Union v. N.L.R.B.*, decided November 14, 1963, 54 LRRM 2535, 48 LC Par. 18,583 (C.A. D.C., No. 17,058). *Dayton* arose under Section 8(b)(7) of the Act where a valid representation election is made an element of the unfair labor practice itself. In that situation, unless the union were permitted, at least where it could

show clear error by the General Counsel, to litigate its contention that unfair labor practices rendered the election invalid, it could itself be found guilty of an unfair labor practice and thus be deprived of the right to engage in peaceful picketing even though one of the preconditions for imposing such a penalty patently had not been met. See *N.L.R.B. v. Local 182 (Woodward Motors)*, 314 F. 2d 53, 59-60 (C.A. 2).

In view of the solicitude which Section 13 of the Act and the First Amendment of the Constitution accord to the right to engage in peaceful primary picketing, stringent procedural requirements could well be imposed in the 8(b)(7) situation. No comparable considerations are applicable here where the only issue is whether an election should be directed to determine if the appellant union continues to enjoy the support of a majority of the employees. In any event, the modification in the *Times Square* principle suggested for the 8(b)(7) cases does not go so far as to permit the kind of automatic relitigation of unfair labor practice issues which appellant seeks here. There must be some showing that the General Counsel's disposition of the charges was clearly erroneous. Appellant has made no such showing here. See *N.L.R.B. v. Local 182 supra*, 314 F. 2d at 60-61.

ARGUMENT

I. Introduction

Appellant acknowledges that the District Court properly refused to set aside the Board's representation determination in the instant case unless that determination violated an express requirement of the Act or a procedural guarantee of the Constitution. In an effort to meet this jurisdictional prerequisite, appellant asserts that the Board's refusal to permit it to litigate its allegation of employer initiation and fostering of the decertification petitions, in the representation hearing on those petitions, violated the Act because it prevented that hearing from being an "appropriate hearing" on the representation

question within the meaning of Section 9(c)(1) and prevented the record in that hearing from being the sole basis for the Board's representation determination in derogation of the same statutory provision. In addition, appellant contends that by directing an election, without affording appellant a representation hearing on the issue it sought to litigate there, the Board deprived it of liberty or property without due process of law, in violation of the Fifth Amendment to the Constitution.

These contentions apparently rest on the assumption that representation proceedings must always stand alone as viable entities and that all issues must, accordingly, be handled in those proceedings or not at all. On the contrary, the issues presented in representation proceedings under Section 9 of the Act and those presented in unfair labor practice proceedings under Section 10 frequently overlap or coincide and when they do, some accommodation must be made for the interaction of the two kinds of procedure.

In the Board's view, a precise coincidence of issues is presented in the instant proceedings, for appellant's charge of employer initiation and fostering of the decertification petitions would, if true, constitute a basis for issuance of an unfair labor practice order against the employer, as well as for dismissal of the petitions in the representation proceeding. See *Sperry Gyroscope Co.*, 136 NLRB 294, 297. Conversely, in the Board's view, any employer cooperation in the filing of the decertification petitions that did not amount to an unfair labor practice under Section 8(a)(1) of the Act would not warrant dismissal of those petitions in the representation proceeding under Section 9(c)(1)(A)(ii). Compare *Dairy Cooperative Assoc.*, 118 NLRB 1564, n. 2; *Clackamus Logging Co.*, 113 NLRB 229, 229-230; and *Belden Brick Co.*, 114 NLRB 52, 52-53 with *Consolidated Blenders*, 118 NLRB 545, 547; *Bond Stores, Inc.*, 116 NLRB 1929; and *Gold Bond, Inc.*, 107 NLRB 1059, 1059-1060.

Since the issue presented in both contexts is thus identical under the standard adopted by the Board, a single

forum for its litigation is deemed appropriate. The Board, accordingly, treats disputed factual allegations of this kind as unfair labor practice issues, litigable only under the adversary procedures designed for resolving such disputes and declines to permit a duplicate litigation of the same issues under the non-adversary procedures reserved for the expeditious disposition of questions of representation.

Effect is given in the representation proceeding however, to any determination made on the issue in an unfair labor practice proceeding. Thus, in the instant case, had the investigation of appellant's unfair labor practice charge revealed sufficient supporting evidence to warrant issuance of a complaint, the representation proceeding would have been held in abeyance pending disposition of the issues raised in the unfair labor practice proceeding initiated by the complaint. See *Kansas City Power and Light Co. v. N.L.R.B.*, 111 F. 2d 340, 357-358 (C.A. 8).⁴ Thereafter, the result reached in the unfair labor practice proceeding would have been made dispositive of appellant's challenge to the validity of the decertification petitions in the representation proceeding. If the petitions had been found to be employer initiated and fostered, the employer and the employee petitioners would have been precluded from asserting their validity in the representation proceeding. On the other hand, if their filing had been found free from unlawful employer promotion and assistance, the Union would have been foreclosed from reasserting their invalidity. Cf. *N.L.R.B. v. Falk Corp.*, 308 U.S. 453; *Kansas City Power and Light Co. v. N.L.R.B.*, *supra*, 111 F. 2d at 357-358.

⁴ See also references to the Board's general policy not to conduct representation elections during the pendency of proceedings to correct unremedied unfair labor practices: *N.L.R.B. v. Trimfit of California*, 211 F. 2d 206, 209, n. 2 (C.A. 9); *Dayton Typographical Union v. N.L.R.B.*, 54 LLRM 2535, 2546, 48 LC Par. 18,583, p. 30,131, decided Nov. 14, 1963, (C.A.D.C. No. 17,058); *Columbia Pictures Corp.*, 81 NLRB 1313, 1314-1315.

Similarly, where no unfair labor practice determination is made by the Board, either because no charge is filed or because, as here, the charge is found to be non-meritorious and a complaint does not issue, the parties are precluded from litigating in a representation proceeding allegations which would be the appropriate subject of an unfair labor practice order, if true. In such situations, those seeking to establish the existence of an unfair labor practice have available to them the same Board procedures available to any other charging party for alleging violations of the Act—but no more. See *Union Mfg. Co.*, 123 NLRB 1633, 1634. Cf. *Everett Plywood & Door Corp.*, 105 NLRB 17, 18.

Contrary to appellant's apparent assumption (Br. 15, 28), the issue presented here is not whether the procedure outlined above represents the best or only defensible method for handling the interaction between unfair labor practice and representation determinations under the statute—that is admittedly a matter on which reasonable men may differ⁵ and one, therefore, properly committed

⁵ Indeed, as appellant points out (Br. 27), the Board's policy in this regard has varied. Thus, the Board originally took the position, adhered to here, that issues of employer initiation and fostering of decertification petitions are unfair labor practice issues to be barred from litigation in representation proceedings. See *Magnesium Casting Co.*, 76 NLRB 251, n. 2; *Century Ribbon Mills, Inc.*, 78 NLRB 933; *Westinghouse Electric Co.*, 78 NLRB 10, n. 1; *Jell-Well Dessert Co.*, 82 NLRB 101; *C & M Lumber Co., Inc.*, 83 NLRB 1258; *Worden-Allen Co.*, 99 NLRB 410, n. 1. In January 1953, however, the Board announced a new policy, permitting litigation of these issues in representation proceedings (*Morganton Full Fashioned Hosiery Co.*, 102 NLRB 134, 135, n. 5), and implemented this policy in a series of subsequent representation determinations. See *Gold Bond, Inc.*, 107 NLRB 1059, 1059-1060; *Clackamus Logging Co.*, 113 NLRB 229, 229-230; *Belden Brick Co.*, 114 NLRB 52, 52-53; *Bond Stores, Inc.*, 116 NLRB 1929; *Consolidated Blenders*, 118 NLRB 545, 547; *Dairy Cooperative Assoc.*, 118 NLRB 1564, n. 2). But after some 6 years' experience with this new procedure, the Board, in June 1959, announced a return to its original policy of excluding such issues from representation proceedings (*Union Mfg. Co.*, 123 NLRB 1633) and it is this policy that was applied by the Board's Regional Director in the instant case (J.A. 11, n. 3).

to the Board's discretion. Rather, the issue presented here at the threshold is whether the District Court had jurisdiction to review the Board's application of its procedure to the circumstances of the instant representation case and this, in turn, depends on whether the procedure followed by the Board constituted a clear violation of a mandatory direction of the Act or a deprivation of appellant's rights under the Constitution. Accordingly, the discussion below is addressed, first, to the limited nature of the exception to the principle of judicial non-reviewability of Board representation determinations established in *Leedom v. Kyne*, 358 U.S. 184; and second, to the failure of appellant to bring the instant case within this limited exception by showing a statutory or constitutional violation. Finally, assuming the existence of jurisdiction in the court below, the concluding argument is addressed to the reasonableness and propriety of the procedure followed by the Board in making its representation determination in the instant case.

II. The District Court Lacked Jurisdiction of the Subject Matter of Appellant's Action

A. *Leedom v. Kyne* establishes a limited exception to the general rule that federal district courts lack jurisdiction to entertain suits to set aside Board representation determinations

In *Leedom v. Kyne*, treating the Board's position as an admission that it had made a representation determination in direct contravention of a mandatory prohibition of the Act,⁶ the Supreme

⁶ The Board did not contest the finding of the lower court that it had violated Section 9(b)(1) of the Act by including professional employees in the same unit with nonprofessionals without first giving the professional employees an opportunity to vote on this inclusion. Section 9(b)(1) provides, in relevant part: "... the Board shall not . . . decide that any unit is appropriate for purposes [of collective bargaining] if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit."

Court held for the first time that Board representation determinations are not immune from direct review in the federal district courts where clearly or admittedly violative of a right expressly granted in the Act and where those adversely affected by the determination have "no other means within their control . . . to protect and enforce that right." 358 U.S. 184, 190. Subsequent decisions of this Court have confined the jurisdictional exception established in *Kyne* within precise and narrow boundaries.⁷ In so doing, these decisions have given recognition to the often expressed Congressional conviction that unless direct review of Board representation determinations is "drastically limited, time-consuming court procedures . . . [will] seriously threaten to frustrate the basic national policy of preventing industrial strife and achieving industrial peace. . . ." *Leedom v. Kyne* (dissenting opinion of Mr. Justice Brennan), 358 U.S. 184, 191.⁸

⁷ *National Biscuit Division v. Leedom*, 265 F. 2d 101, 105 App. D.C. 117, cert. denied, 359 U.S. 1011; *Leedom v. Norwich Printing Specialties Local 494*, 275 F. 2d 628, 107 App. D.C. 170, cert. denied, 362 U.S. 969; *International Assn. of Tool Craftsmen v. Leedom*, 276 F. 2d 514, 107 App. D.C. 268, cert. denied, 364 U.S. 815; *Leedom v. IBEW*, 278 F. 2d 237, 107 App. D.C. 357; *Milk & Ice Cream Drivers and Dairy Employees Union, Local 94 v. McCulloch*, 306 F. 2d 763, 113 App. D.C. 156; *Miami Newspaper Printing Pressmen's Union, Local 46 v. McCulloch*, 322 F. 2d 993, — App. D.C. —. Accord: *Local 1545, Carpenters v. Vincent*, 286 F. 2d 127 (C.A. 2); *McLeod v. Local 476, United Brotherhood of Industrial Workers*, 288 F. 2d 198 (C.A. 2). Cf. *Greyhound v. Boire*, 309 F. 2d 397 (C.A. 5), now pending before the Supreme Court on writ of certiorari, 372 U.S. 964.

⁸ See also the discussion in *McLeod v. Local 476*, 288 F. 2d 198, 200 (C.A. 2) of the experience of the predecessor of the National Labor Relations Board, whose representation investigations and certifications under the National Industrial Recovery Act could be brought directly to the courts for review:

Though there was, at that time, much industrial strife, the Board in almost a year of existence, never succeeded in holding an election if there was objection to holding it. It was impossible to get litigation of such questions through the courts in such time that the decision would be of any use in preventing or solving labor trouble.

Thus, the courts have viewed the decision in *Kyne* as "carving out what was intended to be a narrow exception to a rule that is founded on important considerations of history and policy." *Local 1545 v. Vincent*, 286 F. 2d 127, 133 (C.A. 2). This exception is, accordingly, held to permit direct review only where the Board's representation determination violates a clear and mandatory direction of the Act or a right guaranteed by the Constitution for which the review procedures of the Act itself provide no adequate means of redress. See *Miami Newspaper Printing Pressmen's Union, Local 46 v. McCulloch*, *supra*, 286 F. 2d at 129-130.⁹

Nor can this jurisdictional prerequisite be met simply by couching in constitutional or statutory terms an attack on a Board representation determination that, in fact, amounts to no more than a challenge to the wisdom of the Board's action. See *Schilling v. Rogers*, 363 U.S. 666, 676-677. As this Court stated in *Leedom v. Norwich, Connecticut Printing Specialties and Paper Products Union*, 275 F. 2d 628, 631, 107 App. D.C. 170, 173, cert. denied, 362 U.S. 969:

Whether or not the Board has wisely exercised its discretion in formulating or applying the doctrine is apart from the question whether the Board has failed to give effect to a clear statutory command in this case, so as to justify intervention by the District Court in the normal [Board] process[es]. . . .

Similarly, an attack on a Board representation determination "does not acquire constitutional status merely be-

⁹ Direct judicial review was permitted in *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 17, where "public questions particularly high in the scale of our national interest because of their international complexion" were held to present "a uniquely compelling justification for prompt judicial resolution of the controversy over the Board's power." However, in so holding, the Court took pains to note that "[n]o question of remotely comparable urgency was involved in *Kyne*, which was a purely domestic adversary situation" and that "the exception recognized today is therefore not to be taken as an enlargement of the exception in *Kyne*."

cause the Board's interpretation of the . . . [statute] may have been wrong" in the sense that it would not have been upheld had it been before the court in a normal review proceeding under Section 10 of the Act. *Local 1545 v. Vincent, supra*, 286 F. 2d at 131.

Applying these principles to cases like the present one, where a party dissatisfied with a Board representation determination has attacked the manner in which that determination was made, the courts have held that this is a subject which lies within the Board's administrative discretion and that jurisdiction is, accordingly, lacking to require the Board to adopt some alternate procedure which the courts might deem more appropriate. Thus, this Court stated in *International Association of Tool Craftsmen v. Leedom*, 276 F. 2d 514, 516, 107 App. D.C. 268, 270, cert. denied, 364 U.S. 815:

Appellant also suggests that the Board has evaded its statutory duty to determine the "appropriate unit" by dismissing the craft severance petitions, without a hearing, on the ground that they were not co-extensive with the existing bargaining unit. Section 9(b) requires the Board to determine "in each case" which unit will "assure to employees the fullest freedom in exercising the rights guaranteed by this Act * * *." The Board did not say why employees cannot exercise the fullest freedom in collective bargaining unless severance petitions are coextensive with the existing unit. But the question of an appropriate bargaining unit falls within "the wide area of determinations which depend on the Board's expertise and discretion," *Leedom v. Kyne* [249 F. 2d 490, 491, 101 App. D.C. 398, 399] and the statute does not specify any matters pertinent here which the Board must consider to insure such freedom. Consequently, we cannot say that the Board's procedure has violated any "clear and mandatory provision of the Act" *Leedom v. Kyne, supra*, 358 U.S. page 188. What factors the Board considered and what weight it accorded to them are questions which may only be raised in a judicial review proceeding under § 10.

District court jurisdiction to review Board representation procedure was similarly found lacking in *McLeod v. Local 476*, 288 F. 2d 198 (C.A. 2). In that case an incumbent union, seeking, like appellant here, to resist an election to test its current majority support, sought direct review of the Board's determination that an election was not barred by a collective bargaining agreement between the employer and the union because that agreement, as originally executed, contained certain illegal union-security provisions. The union had offered to prove in the representation proceeding before the Board that subsequent amendment had removed any illegality from the contract, but had been prevented from doing so on the basis of a rule previously adopted by the Board in *Keystone Coat, Apron and Towel Supply Co.*, 121 NLRB 880.

Prior to *Keystone*, the Board had been confronted in representation cases with a variety of arguments why a contract between an employer and an incumbent union should be treated as a bar to an election, despite the questionable validity of the union-security provisions contained therein. For example, it was contended with respect to particular union-security provisions that: (1) although ambiguous and difficult of interpretation, they were not, in fact, illegal; or (2) although illegal as written, they were interpreted and applied by the parties in a lawful manner; or (3) although illegal as originally executed, they were subsequently cured by oral amendment.

In *Keystone*, the Board announced abandonment of its former practice of considering and determining issues of this kind in representation proceedings and its adoption of a rule of easy application. "It said that its former practice had protracted the representation hearings and thus tended to frustrate its objective of securing an early determination of representation questions." *McLeod v. Local 476*, *supra*, 288 F. 2d at 200. The rule, accordingly, announced in *Keystone* was that contracts containing union-security agreements would not act as bars to the

conduct of representation elections unless they contained unequivocal guarantees of legality as originally executed or unless the union-security provisions contained therein had been found to be legal in previously conducted unfair labor practice proceedings.¹⁰

Applied to the facts presented in *Local 476*, the *Keystone* rule thus blocked the union from offering proof in the representation proceeding that a subsequent written amendment had cured the invalidity of its contract as a bar to an election. Although the court expressed understanding of the union's objection to what was "indeed a drastic application of the Keystone doctrine" (288 F. 2d at 200), it nonetheless held that the federal district court lacked jurisdiction to review and set aside the Board's action. The court stated (288 F. 2d at 201):

* * * We perceive no constitutional issue in this case. . . . Congress has left to the Board much freedom of action in its handling of representation matters, including questions of contracts as bars to elections. If the Board has, in the instant case, exercised its discretion unwisely, even unreasonably, that raises no constitutional issue. Congress, by its refusal to confer jurisdiction on the District Courts and the courts, by their adoption of the general rule subject only to . . . [narrowly limited] exceptions have made the important decision that an occasional unreasonable action by the Board, though it goes uncorrected by the courts, is a lesser evil than would be the frustration of seasonable elections by a broadened exposure of election questions to litigation. As is the case with any general rule, its application to particular cases may result in an injustice. If those occur frequently enough, and are serious enough,

¹⁰ The Board subsequently overruled its *Keystone* doctrine in *Paragon Products Corp.*, 134 NLRB 662, cited in appellant's brief at p. 32, n. 23. In *Paragon* the Board reversed the presumption and held that union-security provisions in a contract would *not* be deemed to destroy its legality as a bar to a representation election unless those provisions were "clearly unlawful" on their face, or had been found to be unlawful in a previously conducted unfair labor practice proceeding. *Id.* at 666.

they may cause Congress to amend the legislation, or may cause the courts to invent additional exceptions. This case does not create in us the urge to invent an additional exception. If it did so, the exception would be most difficult to define, or to confine within tolerable boundaries.

Another Board application of its contract bar rules was held free from district court review in *Leedom v. IBEW*, 278 F. 2d 237, 107 App. D. C. 357.¹¹ The Board in that case had shortened the term during which a contract might operate as a bar to an election and had applied this shortened term retroactively. Although this Court strongly questioned the merit of the procedure followed by the Board, it found the district court to be without jurisdiction to set the Board's determination aside, stating (278 F. 2d at 243-244) :

The jurisdiction of the District Court does not depend on whether the Board's retroactive application of the shortened contract bar term is wise—but whether the requirements of constitutional due process preclude the Board from determining that the considerations of orderly procedure and administrative flexibility outweigh the disadvantages to the Union by way of the expense and turmoil of an election and the possibility of losing its representation rights. We hold that the Board is not so precluded.

The limited nature of district court jurisdiction to review Board representation determinations was most recently reiterated by this Court in *Miami Newspaper Printing Pressmen's Union, Local 46 v. McCulloch*, 322 F. 2d 993, — App. D.C. —. The Court there found jurisdiction to review a representation determination under which the Board refused to certify the results of an election, conducted pursuant to Section 9(c), because of an alleged procedural error that had occurred in one of

¹¹ See also *Milk & Ice Cream Drivers Union, Local 98 v. McCulloch*, 306 F. 2d 763, 113 App. D.C. 156; *Local 1545 v. Vincent*, 286 F. 2d 127 (C.A. 2).

the steps leading to the election. Noting that "[t]he apparent procedural defect was one which could be, and was rectified" and that "no injurious effect on the . . . election itself has been advanced at any point," the Court found that the Board had admitted the validity of the election, whose results it nonetheless refused to certify. "On these facts," the Court held that Section 9(c)(1) imposed "a mandatory duty" on the Board to certify the results of the election and concluded that the Board's refusal to do so constituted the equivalent of its admitted violation of the statute in *Kyne*.¹² *Id.* at 998. The Court carefully limited the scope of its holding, however, contrasting its intervention to require compliance with the definitive post-election command of the statute that the Board certify the results of a valid election, with attempts, as here, to secure direct judicial review of discretionary pre-election representation determinations (322 F. 2d at 998, n. 11):

This is not contrary to prior rulings of this Court denying jurisdiction to review Board orders in certification proceedings [Citing cases.] These cases were concerned with challenges to Board action in the area of directing elections, and determination of the "appropriate unit." Section 9(c)(1) does not use mandatory language in referring to the initial action in certification proceedings. Whether a question of representation exists is within that area of expertise in which courts hesitate to interfere.

¹² In the instant case, the appellant union is attempting to enjoin certification of the results of an election in which it fears repudiation and, thus, seeks to retain its certified status without current employee authorization and support. In *Miami*, by contrast, the union was seeking a tally and certification of the results of an employee election. In further justification of the assertion of jurisdiction to review in that case, the Court noted that if the results of the original election were not certified, a substantial number of voters might be disfranchised not only because of sheer physical unavailability but also as a result of expiration of the 12-month period, specified in Section 9(c)(3) of the Act, during which strikers retain their employee voting rights. 322 F. 2d at 999.

B. Appellant's action does not come within the limited Kyne exception

1. *The Board's representation determination did not violate a mandatory requirement of the Act*

Section 9(c)(1) of the Act provides that the Board, upon the filing of a petition for representation or decertification—

* * * shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

In the instant case, the Board held a representation hearing in which it permitted litigation of all relevant representation issues, refusing to pass only on appellant's unfair labor practice allegations, which were then pending before the General Counsel on appeal from the ruling of the Regional Director.¹³ The Regional Director, acting on behalf of the Board¹⁴ thereafter found the existence of a question of representation on the record made at the hearing and, accordingly, directed an elec-

¹³ Although appellant seeks to characterize its offer of proof in the representation proceeding as a precise and unequivocal attack on the decertification petitions themselves, the offer was, in fact, directed toward proving that the Company had violated Section 8(a)(5), (3), (2), and (1) of the Act in all the respects alleged in appellant's unfair labor practice charge (J.A. 11, n. 3). Indeed, appellant moved for the production and incorporation into the representation hearing record of all "the statements and investigative reports" compiled in the files of the Regional Office in its investigation of the charge (J.A. 11, n. 27).

¹⁴ Pursuant to Section 3(b) of the Act, the Board has delegated its powers under Section 9 to its regional directors, subject to Board review in particular instances.

tion to determine the wishes of the employees on that question. To contend, as appellant does, that this procedure violated a mandatory requirement of Section 9(c) of the Act because the hearing provided was not "appropriate" and the representation determination was based on facts outside the "record" is to place "too heavy a strain on the quoted words," *Local 1545 v. Vincent*, 286 F. 2d 127, 132 (C.A. 2).

Whether a particular hearing procedure is "appropriate" or not is, on its face, a matter of judgment and the fact that the Board's judgment on what may appropriately be litigated in a representation hearing differs from appellant's, obviously does not establish a clear violation of an unequivocal statutory command. Congress has not made any attempt to specify the subject matter of an appropriate hearing and certainly has not laid down a clear and mandatory requirement that the issue of employer initiation and fostering of decertification petitions be litigated and determined in every representation proceeding in which it is raised.

N.L.R.B. v. J. I. Case Co., 201 F. 2d 597 (C.A. 9), the case cited by appellant in support of its contention (Br. 21), arose under the normal review procedures established in Section 10(e) and (f) of the Act. Consequently, the court, in enumerating issues that might be the subjects of an appropriate hearing under Section 9(c), was exploring the scope of that provision as a matter of statutory interpretation, not enunciating a clear statutory command.¹⁵ Indeed, the court itself noted that, "[t]he section does not undertake to define the elements which are essential to . . . determining whether or not a question of representation exists" 201 F. 2d at 600. The decision

¹⁵ The issues enumerated by the court as appropriate subjects for inquiry in a representation hearing under Section 9(c)(1) include: whether the issue of representation is one affecting interstate commerce, whether the union has made a request for bargaining that the employer has denied or ignored, and whether there is any subsisting bargaining contract that would operate as a bar to an election. *N.L.R.B. v. J. I. Case Co.*, *supra*, 201 F. 2d at 600.

thus offers no support for appellant's position but, on the contrary, buttresses the Board's view that the provision for an appropriate hearing in Section 9(c)(1) cannot be the predicate for establishing a clear violation of a mandatory direction of the statute, equivalent to that found in *Kyne*. See *Local 1545 v. Vincent*, 286 F. 2d 127, 133 (C.A. 2).

Moreover, the entire scheme of Section 9(c)(1) supports the procedure followed by the Board here, for it specifically provides that many representation determinations are to be made without ever going to hearing. For example, if informal investigation of the petition reveals that an outstanding contract bars an election, the petition will be summarily dismissed, on the ground that the Board has "no reasonable cause to believe that a question of representation affecting commerce exists." Thus, an issue that could be the appropriate subject of a Board representation hearing if the case were to proceed that far may, under the statute, be determined *ex parte* in the course of the initial investigation of the petition by the Board.

Contrary to appellant (Br. 20), the whole nature of the representation proceeding is not transformed because the petition survives this preliminary screening and the Board provides for a hearing. Rather, the proceeding remains essentially non-adversary and investigative throughout, for its purpose is not to adjudicate competing private claims, but to enable the Board to determine the existence of a question of representation under the statute as the predicate for directing an employee election to resolve that question. See *N.L.R.B. v. National Mineral Co.*, 134 F. 2d 424, 426 (C.A. 7), cert. denied, 302 U.S. 753. And in furtherance of this public purpose, it is well settled that Congress has entrusted the Board with "a wide degree of discretion in establishing the procedures and safeguards necessary to insure the fair and free choice of bargaining representatives by employees." *N.L.R.B. v. A. J. Tower*, 329 U.S. 324, 330, quoted in *N.L.R.B. v.*

National Truck Rental Co., 239 F. 2d 422, 426, 99 App. D.C. 259, 262-263, cert. denied, 352 U.S. 1016.

Accordingly, as noted above, the language of Section 9(c) (1) authorizing the Board to provide for an "appropriate" hearing, necessarily carries with it an implication of broad administrative discretion. Thus, the similar provision in Section 9(b) of the Act that the Board shall determine the employee unit "appropriate" for collective bargaining, far from being viewed as a mandatory limitation on the Board's power, has been repeatedly recognized by this Court as an affirmative grant of discretion precluding district court review of representation determinations in that area. See *International Association of Tool Craftsmen v. Leedom*, 276 F. 2d 514, 516, 107 App. D.C. 268, 270, cert. denied, 264 U.S. 815; *Leedom v. Norwich Connecticut Printing Specialities and Paper Products Union*, 275 F. 2d 628, 107 App. D.C. 170, cert. denied, 362 U.S. 969. *National Biscuit Division v. Leedom*, 265 F. 2d 101, 105 App. D.C. 117, cert. denied, 359 U.S. 1011.

In short, as this Court has stated, "Section 9(c) (1) does not use mandatory language in referring to the initial action in certification proceedings" and the Board's determination "[w]hether a question of representation exists is within that area of expertise in which courts hesitate to interfere." *Miami Newspaper Printing Pressmen's Union, Local 46 v. McCulloch*, 322 F. 2d 993, 998, n. 11, — App. D.C. —, and cases there cited.

Similarly lacking in merit is appellant's contention that the Board determined the existence of a question of representation affecting commerce on facts outside the record of the representation hearing. Contrary to the assumption underlying this contention, the issue of employer initiation and fostering of decertification petitions is not determined in a representation proceeding any more than it is litigated there. Properly stated, the Board's policy is to dismiss as invalid decertification petitions that have been adjudged, under the appropriate unfair labor practice procedures, to be employer initiated or fostered in violation of the statute. *Sperry Gyroscope*, 136 NLRB

294, 297. The fact that the instant petitions had not been so adjudged was made clear at the representation hearing¹⁶ and was, in any event, a matter of public record. Thus, appellant's real quarrel is not with a representation determination that the Board made, either on or off the record, but with a determination that it refused to make under procedures that it deems unsuitable for such determinations.

The necessary effect of any specification of proper forum or procedure for the litigation of particular issues is that these issues are then barred from litigation in other forums and any determination made under the approved procedures is given effect in all collateral proceedings in which that issue is raised. This is not to determine issues on facts outside the record of those proceedings, but, on the contrary, to effectuate a policy decision on case-handling procedures by refusing to determine issues in a forum other than the one deemed appropriate for such determinations.¹⁷

¹⁶ Appellant itself framed the offer of proof at the hearing in terms of establishing that the employer had engaged in the violations of the Act alleged in appellant's unfair labor practice charge and acknowledged that these issues were then pending before the General Counsel on appeal from the Regional Director's refusal to issue a complaint, *supra*, p. 21, n. 13.

¹⁷ Appellant's reliance on *Kearney & Trecker Corp. v. N.L.R.B.*, 209 F. 2d 782 (C.A. 7) (Br. 8-9, 18-19) is misplaced. In that case an employer sought to require the Board to produce the materials compiled in its initial representation investigation and to make them part of the record, in much the same way that appellant here sought to require the production and incorporation into the representation hearing record of the materials compiled in the General Counsel's investigation of its unfair labor practice charge. In *Kearney*, the court held that the Board had properly excluded the pre-hearing investigative materials from the record since, under Section 9(c)(1) of the Act, it could not, in any event, make its representation determination on evidence secured outside the hearing. Thus, had the Board here granted appellant's motion and proceeded to base its representation determination on the materials uncovered in the General Counsel's investigation of the unfair labor practice charge, the holding in *Kearney* would have some relevance in the instant case. As noted above, however, the Board did just the opposite of deciding appellant's unfair labor practice

Nor does the fact that the Board attempted, for 6 of the 27 years of its existence, to handle the issue of employer initiation and fostering of decertification petitions in representation proceedings (*supra*, p. 12, n. 5) fix that issue for all time as an immutable element in every Board determination of the existence of a question of representation affecting commerce. The Board must be free to adjust and revise its procedures and this is naturally done, to some extent, on a trial and error basis. Thus, after some experience with the litigation of issues of this kind in representation proceedings between 1953 and 1959, the Board was free to return to its original policy of relegating these issues to unfair labor practice proceedings, as it did in *Union Mfg. Co.*, 123 NLRB 1633, stating at p. 1634:

* * * [I]t is the general rule that unfair labor practice allegations are not properly litigable in a representation proceeding. . . . We have carefully considered and reappraised the relative advantages and disadvantages of retaining, as an exception to the general rule, the practice of allowing issues of employer instigation of, or assistance in, the filing of the decertification petition to be litigated in the representation proceeding. It is our opinion that the same factors which weigh against permitting litigation of unfair labor practice matters in other types of representation cases are present, and should likewise prevail, in decertification cases. If there is a basis for alleging employer responsibility for the filing of a decertification petition, the Board's complaint procedures provide a forum in which such an issue may be properly litigated, and an appropriate remedy obtained. At the same time, valid decertification petitions may be processed with a minimum of

allegations in the representation proceeding on facts outside the hearing record, for it declined to pass on the unfair labor practice issues in the representation proceeding and refused to admit the *ex parte* unfair labor practice materials into evidence in the representation hearing. Appellant's citation of *Kearney* is, accordingly, inapposite.

complication and delay. Accordingly, we herein enunciate the Board policy to exclude from decertification cases any evidence of employer participation in the institution of the proceeding, whether the alleged evidence pertains to showing of interest or to employer responsibility for the filing of the petition.

Far from being contrary to a mandatory prohibition of the statute, this adjustment of remedies and procedures within the agency to reduce duplication and promote consistency is necessarily a matter for administrative discretion and thus lies beyond the limited purview of district court jurisdiction in representation matters.¹⁸ Indeed, statutory support for the procedure adopted by the Board is provided by Section 3(d) of the Act, for it adds to considerations of administrative consistency and efficiency, a statutory scheme for separation of powers within the agency, under which the General Counsel is given "final authority" with respect to the investigation of unfair labor practice charges and the issuance of complaints if the charges are found to have merit. Thus, in the Board's view, it would be inconsistent with the General Counsel's authority under the statute for it to permit litigation in a representation proceeding of factual allegations that the General Counsel found so lacking in evidentiary support that he declined even to allege a violation of the Act by issuing a complaint on them. As the Board stated in *Everett Plywood & Door Corp.*, 105 NLRB 17, 18 (citing its decision in *Times Square Stores Corp.*, 79 NLRB 361, 364-365):

It is clear, and . . . [the Union] does not deny, that the proffered evidence was intended to prove substantially the same basic factual allegations which underlay the unfair labor practice charges. In effect,

¹⁸ As this Court stated in another context, "Administrative flexibility is, after all, one of the principal reasons for the establishment of the regulatory agencies. It permits valuable experimentation and allows administrative policies to reflect changing policy views." *Leedom v. IBEW*, 278 F. 2d 237, 243, 107 App. D.C. 357, 363.

therefore, . . . [the Union] is attempting in this representation proceeding to achieve at least part of the objectives of the dismissed charges. . . . However, Section 3(d) of the Act makes the General Counsel the final arbiter in respect of the investigation of charges and the issuance and prosecution of complaints. Under established policy the Board will, therefore, not review directly the General Counsel's administrative dismissals of unfair labor practice charges; nor will the Board do so indirectly by examining the factual situation which was before the General Counsel, in order to dispose of allegations in representation proceedings as part of the Board's responsibility under Section 9(c) of the Act.

See also, *Columbia Pictures Corp.*, 85 NLRB 1085, 1086-1087; *David Max and Co.*, 109 NLRB 1308, 1308-1309.

Appellant urges that the Board might avoid any apparent inconsistency of determinations in the two proceedings or any apparent undermining of the General Counsel's authority under the statute by taking the position that employer initiation and fostering of a decertification petition for the purposes of a representation proceeding may not be employer initiation and fostering in an unfair labor practice context (Un. Br. 31). In other words, appellant says the Board might have two different standards and thus justify two different results.

Assuming this to be so, it does not make out a case for appellant. In order even to establish jurisdiction, appellant must show, not simply that the Board *could* have two different standards, but that it *must* do so because the Act unequivocally commands it or the Constitution so requires. The alternative for appellant, is to urge that although the issue presented may be viewed as identical in both contexts, *i.e.*, did the employer initiate and foster the petitions or not, the Act or the Constitution requires the Board to provide duplicate procedures for its disposition and to live with whatever inconsistency or intra-agency conflict this may produce. Thus, the issue presented at the outset in this Court is not whether the policy followed by the Board in the instant case is re-

quired by Section 3(d) of the Act (Un. Br. pp. 25-33)¹⁹ but whether the Board could adopt this policy, as a matter of discretion, in the interest of promoting administrative consistency and protecting the separation of powers specifically provided for in the statute.²⁰

Moreover, "[i]n another sense the argument [urged by appellant] proves too much" (*Local 1545 v. Vincent*, 286 F. 2d 127, 132 (C.A. 2)); for appellant's reading of the "upon the record" provision of Section 9(c)(1) would lay down a statutory requirement for independent litigation and determination in a representation proceeding, not simply of unfair labor practice issues disposed of in the investigative stage by the General Counsel's refusal to issue a complaint, but also of issues determined following a full scale unfair labor practice proceeding.²¹ For example, in the instant case, if the General Counsel had overruled the Regional Director's refusal to issue an unfair labor practice complaint and if the Board had then found in the unfair labor practice proceeding that the employer had initiated and fostered the decertification petitions, the interpretation of Section 9(c)(1) urged by appellant would preclude the Board from overruling the Regional Director's Decision and Direction of Election and summarily dismissing the decertification petitions on the basis of its own previous unfair labor practice determination. In appellant's view, the Board would be required to reopen the representation proceeding and provide for a fresh litigation and independent determination of the issue of employer initiation and fostering of the decertification petitions in the representation context.

¹⁹ See *Local 1545, Carpenters v. Vincent*, 286 F. 2d 127, 131 (C.A. 2).

²⁰ The merits of the Board's policy are discussed *infra*, pp. 35-42.

²¹ Similarly, it would act as a limitation on the Board's power to settle unfair labor practice cases without litigation and to give that settlement agreement effect in subsequent representation proceedings instituted by parties not privy to the settlement agreement. See *Poole Foundry and Machine Co. v. N.L.R.B.*, 192 F. 2d 740, 743 (C.A. 4), cert. denied 342 U.S. 954.

Nor would appellant's argument be limited to issues of employer initiation and fostering of decertification petitions.²² For instance, if the Board were to dismiss a representation petition because the petitioning union had been found to be employer dominated in violation of Section 8(a)(2), in a prior or contemporaneous unfair labor practice proceeding, appellant's reading of Section 9(c)(1) would make this an unlawful determination of the existence of a question of representation on facts outside the representation hearing record. Cf. *N.L.R.B. v. Falk Corp.*, 308 U.S. 453; *Kansas City Power and Light Co. v. N.L.R.B.*, 111 F.2d 340, 357-358 (C.A. 8).²³ Similarly, the Board would be precluded from treating an unfair labor practice determination on the legality of union-security provisions in a collective bargaining agreement as dispositive of that issue for the purposes of determining whether the contract could act as a bar to an election in a representation proceeding. See *Paragon Products Corp.*, 134 NLRB 662.²⁴

²² For a general statement of the Board's policy of excluding unfair labor practice issues from representation proceedings, see *Flint Mfg. Co.*, 62 NLRB 1003, 1003-1004; *Baltimore Transit Co.*, 59 NLRB 159, 162-165.

²³ See *Kansas City Structural Steel Co.*, 18 NLRB 291, 292-293; *The Steel Storage File Co.*, 27 NLRB 210, 212-213; *Mine "B" Coal Co.*, 29 NLRB 405, 407-408; *Gutmann and Co., Inc.*, 30 NLRB 1, 2; *Bethlehem Steel Corp.*, 30 NLRB 1006, 1007, 1009; *H.O. Canfield*, 76 NLRB 606, 607, n. 4; *Harris Transfer & Warehouse Co.*, 79 NLRB 1420, n. 1; *Brown Express*, 80 NLRB 753, n. 2; *National Foundry Co.*, 109 NLRB 357, 358-359; *David Max and Co.*, 109 NLRB 1308, 1308-1309; *East Texas Pulp & Paper Co.*, 113 NLRB 539, 540; *Bi-States Co.*, 117 NLRB 86, n. 2; *Nathan Warren & Sons, Inc.*, 119 NLRB 292, 294; *Northwest Protective Service, Inc.*, 124 NLRB 840, 842, n. 3; *Sabine Towing Co., Inc.*, 126 NLRB 61. See also, *John A. Roebling's Sons Co.*, 31 NLRB 160, 161; *A. E. Staley Mfg. Co.*, 31 NLRB 946, 947-948, n. 1; *Standard Oil of California*, 63 NLRB 471 476, n. 9.

²⁴ Contrary to appellant's suggestion (Br. 32, n. 23), the policy announced by the Board in *Paragon Products*, *supra*, 134 NLRB at 666-667, with respect to contract bar rules, is consistent with the holding in the instant case and with the decisions in *Times Square* 79 NLRB 361, and *Union Mfg. Co.*, 123 NLRB 1633. In *Paragon*,

In sum, the construction of Section 9(c)(1) urged by appellant would stretch the concept of an unequivocal statutory command past the breaking point and would go far beyond the facts of the instant case, with frequently incongruous results; for it would play havoc with the rules adopted by the Board over the years in the internal adjustment of its unfair labor practice and representation procedures. Moreover, the representation procedure that appellant seeks to impose on the Board as mandatory would seriously undercut the "wide degree of discretion" with which "Congress has entrusted the Board . . . in establishing the procedures and safeguards necessary to insure the fair and free choice of bargaining representatives by employees." *N.L.R.B. v. A.J. Tower*, 329 U.S. 324, 330.

2. *The Board's representation procedure did not violate the due process clause of the Constitution*

Appellant contends that the Board is under a constitutional inhibition not to certify the results of the election, in which the employees may have rejected appellant as their representative, without giving it an opportunity to demonstrate in a representation hearing that the petitions which constituted the predicate for the election were employer initiated and fostered.²⁵ It is well settled, however,

as noted *supra*, p. 18, n. 10, the Board held that it will reject as bars to an election contracts whose union-security provisions are unlawful on their face or have been found to be unlawful in an unfair labor practice proceeding. This is not to hold, as appellant apparently assumes, that where the violation is clearly apparent on the face of the contract, the unfair labor practice issue may be litigated in the representation proceeding, in derogation of the General Counsel's final authority, under Section 3(d); for if the illegality is uncontrovertible on the face of the instrument, no litigation is necessary and the possibility of conflict with the General Counsel's initial unfair labor practice determination is virtually eliminated.

²⁵ Appellant's attack in this case is limited to the technical validity of the petitions themselves; it is not contended here that the alleged employer involvement in the filing of the petitions interfered with the conduct of a fair and free election or affected the election re-

that "[t]he Fifth Amendment does not require a trial-type hearing in every conceivable case of government impairment of private interest." *Cafeteria & Restaurant Workers Union, Local 473 v. McElroy*, 367 U.S. 886, 894. See also, *White v. Herzog*, 80 F. Supp. 407, 411 (D.C. D.C.), and cases there cited. The "consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." *Cafeteria & Restaurant Workers Union v. McElroy*, *supra*, 367 U.S. at 895. Thus, the formal hearing requirements imposed by due process in a particular case will depend on a variety of factors, such as the "substantial[ity] or insubstantial[ity]" of the legal or factual issues for which the hearing is sought, "the substantive nature of the asserted [private] right or interest involved," and the weight of the public interest to be balanced on the other side; for the imposition of sweeping and rigid hearing requirements "would do violence to . . . the constitutional power of Congress to devise differing administrative and legal procedures appropriate for the disposition of issues affecting interests widely varying in kind." *Federal Communications Commission v. WJR*, 337 U.S. 265, 275, 276.

Appellant acknowledges that an individual charging violations of the Act has no right to a hearing on whether a complaint should issue based on these charges. The constitutionality of the procedure under which non-meritorious unfair labor practice charges are screened out on the basis of an *ex parte* investigation is well settled,

sults. Cf. *Miami Newspaper Printing Pressmen's Local No. 46 v. McCulloch*, 322 F. 2d 993, — App. D.C. —. Appellant's citation of *Dayton Typographical Union v. N.L.R.B.*, decided Nov. 14, 1963, 54 LRRM 2535, 48 LC Par. 18,583 (C.A. D.C. No. 17,058) is, accordingly, inapposite. Moreover, in *Dayton* the restraint of recognition picketing by a majority union raised substantial constitutional issues not presented here by appellant's efforts to avoid a test of its majority support in the unit is currently seeks to represent. See discussion, *infra*, pp. 38-42.

as is the final authority of the General Counsel with respect to the investigation of charges and the issuance of complaints.²⁶ And the constitutionality of the representation procedure applied by the Board here would seem to follow *a fortiori* from these precedents. Appellant attempts, however, to distinguish unfair labor practice and representation procedures in this respect, asserting that while "Congress may predicate the availability of a new public remedy on the results of an *ex parte* investigation and the exercise of discretion by a government official, the right of a union to continue as a bargaining representative . . . may not constitutionally be conditioned on the outcome of a proceeding in which the union is not allowed to confront and cross-examine adverse witnesses." (Br. 23, n. 16).

Contrary to appellant's assertion, representation proceedings are quite as much in the public interest as unfair labor practice proceedings and the private interests incidentally involved in the latter are as great or greater than those in the former. For example, the interest of a union in having an employer ordered to bargain with it, or of a discharged employee in having his reinstatement with backpay ordered, is at least as substantial as appellant's interest here in avoiding an election on these particular petitions.²⁷ Indeed, once a complaint has is-

²⁶ *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1. See *Houriham v. N.L.R.B.*, 201 F. 2d 187, 91 App. D.C. 316, cert. denied 345 U.S. 930; *Retail Store Employees Union, Local 954 v. Rothman*, 298 F. 2d 300, 112 App. D.C. 2; *Bandlow v. Rothman*, 278 F. 2d 866, 108 App. D.C. 32, cert. denied, 364 U.S. 909; *Dunn v. Retail Clerks, Local 1529*, 307 F. 2d 285, 288 (C.A. 6); *Anthony v. N.L.R.B.*, 204 F. 2d 832, 834 (C.A. 6); *Manhattan Construction Co. v. N.L.R.B.*, 198 F. 2d 320 (C.A. 10); *General Drivers, etc. v. N.L.R.B.*, 179 F. 2d 492, 494-495 (C.A. 10); *Lincourt v. N.L.R.B.*, 170 F. 2d 306, 307 (C.A. 1). See also, *Division 1267 v. Ordman*, 320 F. 2d 729, — App. D.C. —; *N.L.R.B. v. Lewis*, 249 F. 2d 832, 838 (C.A. 9, affirmed 357 U.S. 10, 15-16; *Laundry Workers Union v. N.L.R.B.*, 197 F. 2d 701, 702-704 (C.A. 5).

²⁷ Thus, even if appellant were able to prevail with its claim that the employer had initiated or fostered the petitions, it would succeed only in setting aside this election. Nothing would prevent

sued, an unfair labor practice proceeding is given many of the aspects of an adversary proceeding, in deference to the private rights of the individual litigants, but a representation proceeding is non-adversary in character from beginning to end and, as such, is specifically exempted from the hearing requirements of the Administrative Procedure Act. 60 Stat. 239, 5 U.S.C. Sec. 1004 (6). See *N.L.R.B. v. National Mineral Co.*, 134 F. 2d 424, 426 (C.A. 7), cert. denied, 302 U.S. 753. Cf. *Marine Engineers' Beneficial Assn. v. N.L.R.B.*, 202 F. 2d 546 (C.A. 3), cert. denied 346 U.S. 819; *Int'l Union of Electrical Workers v. N.L.R.B.*, 289 F. 2d 757, 110 App. D.C. 91; *Textile Workers Union v. N.L.R.B.*, 294 F. 2d 738, 739, 741, 111 App D.C. 109, 110, 112 and 315 F. 2d 41, 114 App. D.C. 295.

Thus, such concepts as "confrontation" and "cross-examination" have little significance in a representation context, for the interest of the public in preventing industrial unrest through the provision of machinery for promptly and accurately registering employee free choice is the primary aim of Section 9 of the Act. The interest of unions or employers in the expression of that choice, while very real, is purely secondary to this public purpose under the statutory scheme and that scheme, for the reasons outlined above, is entirely consistent with

the employer from then filing a representation petition in its own name or the Board from processing that petition and conducting an election on it. Section 9(c)(1)(B). Should a majority of the employees in such an election vote not to be represented by appellant, it would, of course, have no right to act as exclusive bargaining agent against their will. In short, whatever interest appellant has in its representative status is dependent on the wishes of a majority of the employees. And, contrary to appellant, it is this interest of the employees in selecting their own representatives that is the "essence of the rights" the Act was passed to protect, not the interest of labor organizations in maintaining their status indefinitely (Br. p. 25). The right that appellant seeks to vindicate in a formal hearing (i.e., the right not to have the employees' choice expressed in an election on these particular petitions) is thus to be contrasted with the substantial private interests at stake in the due process cases cited by appellant (Br. pp. 23-25).

the requirements of the due process clause of the Constitution. See *McLeod v. Local 476*, 288 F. 2d 198 (C.A. 2); *National Maritime Union v. Herzog*, 78 F. Supp. 146, 155-156, 160-161 (D.C. D.C., three-judge court), *aff'd* in relevant part, 334 U.S. 854.²⁸

III. The Board's Representation Procedure Is Valid and Proper

The Board has long operated under the general rule that unfair labor practice allegations are not properly litigable in a representation proceeding. In announcing its decision to bring the practice with respect to issues of employer initiation and fostering of decertification petitions into line with this general rule by barring them from litigation in a representation hearing, the Board stated in *Union Mfg. Co.*, 123 NLRB 1633, 1634:

If there is a basis for alleging employer responsibility for the filing of a decertification petition, the Board's complaint procedures provide a forum in which such an issue may be properly litigated, and an appropriate remedy obtained. At the same time valid decertification petitions may be processed with a minimum of complication and delay.

The procedure followed by the Board here thus prevents duplicate litigation of identical issues, promotes administrative consistency, and keeps representation proceedings

²⁸ Insofar as appellant contends that the Board could not constitutionally conduct a representation election without first permitting all parties to litigate every issue relevant to the existence of "a question of representation affecting commerce," this claim is refuted by the decision of the Ninth Circuit in *Department & Specialty Store Employees' Union, Local 1265 v. Brown*, 284 F. 2d 619, 628 (C.A. 9). Indeed, there the Court upheld the constitutionality of Section 8(b)(7)(C) of the Act which authorizes the Board to conduct elections under that provision without holding *any* hearing at all. Moreover, as noted *supra*, p. 23, many claims of representation are dismissed by the Board *ex parte* on the basis of the preliminary investigation of the petitions specifically authorized by Section 9(c)(1) of the Act and this procedure has long been followed with judicial approval.

as uncluttered and expeditious as possible, while relegating the complicated factual issues frequently involved in unfair labor practice allegations to the adversary procedures specifically designed for their resolution.²⁹

Further support for this procedure is supplied by the "final authority" vested in the General Counsel under Section 3(d) of the Act, for the spirit of the intra-agency separation of powers thus established requires the Board to refrain from determining in a representation proceeding issues foreclosed by the General Counsel's refusal to issue an unfair labor practice complaint. *Times Square Stores Corp.*, 79 NLRB 361. Contrary to appellant (Br. 30), the refusal of the General Counsel to issue such a complaint in the instant case was premised solely on the lack of factual support for appellant's allegations and did not depend on policy or budgetary considerations unrelated to the merits of the case. Thus, following full investigation of the unfair labor practice charge, "[i]t was . . . concluded that the evidence was insufficient to establish that the Company initiated, fostered, or assisted the filing of the decertification petitions" (J.A. 18).

Appellant does not suggest that this determination was arbitrary or capricious; nor does it specify the particular employer conduct that is alleged to warrant dismissal of the petitions or attempt to explain why the resolution of this issue should be different from that reached in the unfair labor practice proceedings. Instead, appellant deals in conclusions and absolutes, asserting it has an unqualified right to have the issue of alleged employer

²⁹ Unfair labor practice hearings are subject to Sections 7 and 8 of the Administrative Procedure Act and are held before a Trial Examiner, who is empowered to make credibility resolutions, findings of fact, and conclusions of law and to issue a recommended order. Board's Rules and Regulations, Secs. 102.35, 102.45. Representation hearings, on the other hand, are exempted from the requirements of the APA, and are conducted by "an officer or employee of the regional office," who does not make any credibility resolutions, findings, or recommendations, but may only prepare an "analysis" of the record for the Board. Section 9(c)(1) of the Act. Board's Rules and Regulations, Sec. 102.66(f).

"initiation and fostering" litigated and determined in the representation proceeding, without regard to the disposition made of the same ultimate issue in the unfair labor practice proceeding. Thus, although now characterized as an attack on the Board's representation determination, appellant's action is, in reality, an attempt to secure circuitous review of the General Counsel's refusal to issue a complaint—a review precluded by the language of Section 3(d) and by the precedents of the Board and the courts. See cases cited *supra*, pp. 27-28, 33 n. 26.

Nor is this view as to the propriety of the procedure followed here affected by this Court's decision in *Dayton Typographical Union v. N.L.R.B.*, decided Nov. 14, 1963, 54 LRRM 2535, 48 L.C. Par. 18,583 (C.A.D.C. No. 17,058). That case concerned the propriety of restraining recognitional picketing by a majority union which, claiming that the employer had unlawfully withheld recognition, picketed without filing the timely representation petition required by Section 8(b)(7)(C). In sustaining the Board's finding that such picketing constituted a violation of the statutory provision, notwithstanding the possible employer unfair labor practices, the Court noted that, under Board procedures, a union in this situation could protect itself by filing both a timely representation petition and an unfair labor practice charge against the employer. In the course of that discussion, the Court made the following statements upon which appellant apparently seeks to predicate its entire case (54 LRRM 2545, 48 L.C. Par. 18,583, p. 30, 131):

Whether or not the General Counsel chooses to issue a complaint on such charges, the union is protected. If no complaint on the unfair practice charge is issued, the union will still be free to continue its picketing and may, in the proceedings on its petition for an election, bring to the attention of the Board the effect of the claimed unfair practices on the prospects of holding a fair and free election. In such a case, the Board, if it considers that the unfair practices of the employer make a fair election impossible,

would and should defer such an election until it can be conducted in an atmosphere devoid of unfair pressures.

Assuming *arguendo* that this language was intended to establish a requirement that the Board consider in the representation proceeding alleged unfair labor practice conduct on which the General Counsel had refused to issue a complaint,³⁰ the holding was clearly limited to the situation presented under that provision of the statute. Thus, in a footnote to the above-quoted language the Court added (*Id.* at n. 24):

True, the exercise of the discretion of the General Counsel, in deciding whether or not he will issue a complaint, is largely unreviewable. [Citation] But this, it seems to us, does not adversely affect the position of the complaining union in respect of problems arising under Section 8(b) (7).

³⁰ The language in *Dayton* relied upon by appellant is not in fact inconsistent with the Board's *Times Square* rule, as it has been applied in practice. The Court, we submit, was recognizing the Board's long standing policy that employer conduct may interfere with the holding of a fair election even when it does not amount to an unfair labor practice. *General Shoe Corp.*, 77 NLRB 124, 126; *Peerless Plywood Co.*, 107 NLRB 427, 429-430. Here, of course, the only kind of employer "initiation and fostering" of decertification petitions that will justify their dismissal is that which amounts to an unfair labor practice under Section 8(a)(1). Here, therefore, the General Counsel's determination that there is insufficient evidence to warrant issuance of a complaint is not within that area where the identical factual allegation passed upon by the General Counsel in dismissing an unfair labor practice charge may nonetheless serve, under Board procedures, to set aside a representation election. (Cf. the Regional Director's rulings on appellant's objections to employer conduct alleged to interfere with a fair and free election, which were filed after the election, pursuant to Section 102.69 of the Board's Rules and Regulations, and which are not in issue here, *infra*, pp. 52-53.) Rather, this is precisely the case where *Times Square* must operate if any deference at all is to be accorded to the "final authority" of the General Counsel under Section 3(d) with respect to the issuance of complaints. Indeed, appellant's attack on the Board's pre-election procedure here is not addressed to employer conduct alleged to interfere with a fair and free expression of employer choice; it is limited to the technical invalidity of the decertification procedures. In that sense, at least, the language of *Dayton* appears inapposite.

That Section 8(b)(7) presents special problems in segregating the General Counsel's unfair labor practice actions, on the one hand, and the Board's representation determinations, on the other, is evidenced by the scheme of the statutory provision itself, under which unfair labor practice and representation issues are thoroughly enmeshed. Thus, the section makes an unfair labor practice of recognition or organizational picketing in three situations, each of which depends on a representation determination under Section 9(c) of the Act: (A) where the employer has lawfully recognized another labor organization and a question of representation may not appropriately be raised under Section 9(c); (B) where within the preceding 12 months a valid election under Section 9(c) of the Act has been conducted; and (C) where the picketing has been conducted without a petition under Section 9(c) being filed within a reasonable period of time not to exceed 30 days from the commencement of picketing.

Indeed, a proviso to Section 8(b)(7)(C) establishes an election procedure within the unfair labor practice context, for it provides that when a timely petition has been filed, the Board shall direct an election forthwith in the unit it finds appropriate, without regard to the requirements of Section 9(c)(1) or the absence of a showing of substantial interest on the part of the labor organization, and shall thereafter certify the results of that election.

The special problem of separating out unfair labor practice and representation issues under 8(b)(7) was recognized in *N.L.R.B. v. Local 182, Teamsters (Woodward Motors)*, 314 F. 2d 53 (C.A. 2). In that case, the court questioned whether the Board's *Times Square* doctrine could be applied with full force in situations arising under Section 8(b)(7)(B), which prohibits recognition or organizational picketing where a valid election under Section 9(c) has been conducted within the preceding 12 months. The union there sought to defend its picketing by alleging in the unfair labor practice proceeding that the election which had been conducted was

not "valid" because the employer was guilty of unfair labor practices that had not been remedied. This allegation was rejected by the Board on the basis of its *Times Square* rule because the General Counsel had previously refused to issue an unfair labor practice complaint based on 8(a)(2) and (5) charges filed by the union against the employer.

Laying heavy emphasis on the statutory provision that the election must be "valid" in order to act as a bar to the picketing, the court stated (314 F. 2d at 60), "Although we appreciate the difficulties, arising from the internal bifurcation of the Board . . . [citing *Times Square*] we are not sure the issue can always be settled in such summary fashion. . . [A]n election in which a union has in fact been strong-armed by tactics violating § 8(a) would hardly be 'valid' under § 8(b)(7) (B)—even in the unlikely event that the General Counsel had refused to issue a complaint and although the Board could not make him issue one, and his refusal would not be reviewable by a court of appeals under § 10(f) . . . and only dubiously so by a district court . . . [citing cases]." Thus, the decision is by its terms limited to situations peculiar to Section 8(b)(7).

Moreover, even in this limited context, if some modification of the *Times Square* rule is required, it does not follow that the door would necessarily be opened to the extent of permitting automatic relitigation of every unfair practice issue on which the General Counsel has refused to issue a complaint. In *Woodward*, the court, after making the observation set forth above, rejected the union's attempt in that case to secure Board review of the General Counsel's refusal to issue a complaint, stating, in language also pertinent here (314 F. 2d at 60-61):

However, a union wishing to argue that an election is invalid because of the employer's unremedied unfair labor practices despite the General Counsel's refusal to act upon its charges, must do more than prove that it has filed charges which the General

Counsel has dismissed; there must be something to indicate that he was wrong in doing so and that unfair labor practices in fact prevented a valid election.

As noted above, although appellant made a general offer of proof that the employer had engaged in the unfair labor practices alleged in its charge, it did not specify the particular employer conduct that was supposed to warrant dismissal of the decertification petitions; nor challenge the propriety of the General Counsel's determination, as such; nor suggest why the resolution of the issue in a representation proceeding should be different from that reached in the investigation of the unfair labor practice charge. This unspecified allegation would not be a sufficient basis for overturning the General Counsel's complaint determination under the test enunciated in *Woodward*.

In sum, the decisions in *Dayton* and *Woodward*, insofar as they suggest a modification of the Board's *Times Square* rule, must be limited to an 8(b)(7) context where a valid representation election is made an element of the unfair labor practice itself. In that situation, unless the union were permitted, at least where it could show clear error by the General Counsel, to relitigate its contention that unfair labor practices rendered the election invalid, it could itself be found guilty of an unfair labor practice and thus be deprived of the right to engage in peaceful picketing even though one of the preconditions for imposing such a penalty patently had not been met. In view of the solicitude which Section 13 of the Act and the First Amendment of the Constitution³¹ accord to the right to engage in peaceful primary picketing, more stringent procedural requirements could well be imposed in the 8(b)(7) situation than in others.

The situation here is not comparable. All that is involved is the question of whether an election should be

³¹ The constitutional problem in *Dayton* was particularly substantial for the majority status of the union was apparent.

directed to determine if appellant continues to enjoy the support of a majority of the employees. Even if, contrary to the General Counsel's determination, the petitions were employer-sponsored, precluding a relitigation of this question in the representation hearing does not impose on appellant the various disabilities present in the 8(b)(7) situation.³² On the other hand, if it be assumed that the General Counsel was correct in concluding that the petitions were ^{not} employer-sponsored and appellant were nevertheless permitted to relitigate this question in the representation proceeding, the employees would have been needlessly delayed in the exercise of their right to vote on whether they desired continued representation by appellant and, assuming that the ultimate vote is against appellant, of their right to be free of an unwanted representative.

In any event, as shown above, the modification in the *Times Square* principle suggested for the 8(b)(7) cases does not go so far as to permit the kind of automatic relitigation of unfair labor practice issues that appellant seeks here. There must be some showing that the General Counsel's disposition of the charges was clearly erroneous. Appellant has made no such showing here.

³² Should appellant ultimately be decertified following an unfavorable vote of the employees and should it still continue to picket for recognition, an 8(b)(7)(B) charge could, of course, be filed against it. In that event, however, appellant would be in a position to avail itself of the special procedure for 8(b)(7) cases discussed above.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the District Court should be affirmed.

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February 1964.

APPENDIX A

Statutory Provisions Involved

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

NATIONAL LABOR RELATIONS BOARD

Sec. 3 (b) The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. The Board is also authorized to delegate to its regional directors its powers under section 9 to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot under subsection (c) or (e) of section 9 and certify the results thereof, except that upon the filing of a request therefor with the Board by an interested person, the Board may review any action of a regional director delegated to him under this paragraph, but such a review shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director. . . .

* * * *

(d) There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than trial examiners and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10, and in respect of the

prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law. . . .

* * * *

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

Sec. 8(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(2) to dominate or interfere with the formation of administration of any labor organization or contribute financial or other support to it:

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the

beginning of such employment or the effective date of such agreement, whichever is the later, . . .

* * * *

(5) to refuse to bargain collectively with the representative of his employees, subject to the provisions of section 9(a).

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * *

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees: (A) where the employer has lawfully recognized in accordance with this Act any other labor organization and a question concerning representation may not appropriately be raised under section 9(c) of this Act, (B) where within the preceding twelve months a valid election under section 9(c) of this Act has been conducted, or (C) where such picketing has been conducted without a petition under section 9(c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: *Provided*, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 9(c)(1) or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: *Provided further*, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including

consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services. Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this section 8(b).

REPRESENTATIVES AND ELECTIONS

Sec. 9(a) Representatives designated or selected for the purpose of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: . . .

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided*, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation . . .

(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their be-

half alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

* * * *

(3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this Act in any election conducted within twelve months after the commencement of the strike. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

* * * *

PREVENTION OF UNFAIR LABOR PRACTICES

* * * *

Sec. 10(e) The Board shall have power to petition any court of appeals of the United States, . . . within any circuit . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order. . . . Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. . . . Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board;

APPENDIX B

Lawrence, Kansas

UNITED STATE OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. 17-RD-235

Case No. 17-RD-236

KANSAS COLOR PRESS, INC. EMPLOYER

and

JOE SWADLEY and PHOEBE SCHNECK, Employees,
PETITIONERS

and

FRANCIS G. SMYSOR, Employee, PETITIONER
and

LAWRENCE TYPOGRAPHICAL UNION No. 570, affiliated with
INTERNATIONAL TYPOGRAPHICAL UNION, AFL-CIO, UNION

SUPPLEMENTAL DECISION AND ORDER

The petition in Case No. 17-RD-235 was filed on January 15, 1963, and that in Case No. 17-RD-236 on January 21, 1963. Following a hearing covering the issues raised by both petitions, the Regional Director for the Seventeenth Region issued a Decision and Direction of Election on June 7, 1963. A request for review filed by the Union was denied by the Board on July 23, 1963, and an election by secret ballot was held on August 28, 1963, under the direction and supervision of said Regional Director. The tally of ballots, issued and served upon the parties upon the conclusion of the election, showed that a total of 68 ballots had been cast, all of which were challenged. The ballots were impounded. Pursuant to prior notice, the box containing the impounded ballots was opened on November 7, 1963, in the presence of

representatives of all parties to this proceeding. None of the challenged ballot envelopes was opened, but a list was established showing specifically by whom the particular ballot had been challenged and the reason for such challenge. Upon completion of this task the box containing the challenged ballot envelopes was resealed.

Subsequent to the Board's denial of the Union's request for review on July 23, 1963, the Union filed with the United States District Court for the District of Columbia a Complaint for Injunction and Declaratory Relief, Civil Action No. 1969-63, seeking in effect to enjoin the Board and all its agents from holding any election in the subject matters, to vacate and set aside the aforesaid Decision and Direction of Election, and to declare said Decision and Direction of Election to be contrary to law and null and void. There was also a prayer for a preliminary injunction to the same effect. On October 3, 1963, the Court denied the Union's motion for a preliminary injunction and, further, granted the Board's motion for summary judgment in its favor. Although informed that the Union intends appealing from the adverse ruling of the District Court, the undersigned is unaware of steps taken.

Under date of September 3, 1963, the Union filed timely objections to the election of August 28, 1963, mailing copies thereof to the Employer, each Petitioner, and counsel for the Employer. The objections, numbered consecutively from 1 through 6, will be discussed *seriatim* below.

Pursuant to Section 102.69(c) of the Board's Rules and Regulations, Series 8, as amended, the objections and the challenged ballots have been administratively investigated. On the basis of that investigation, I make the following

FINDINGS AND CONCLUSIONS CONCERNING OBJECTIONS¹

Allegation 1: Since the filing of the decertification petitions, and prior thereto, the Employer by its unfair labor practices has restrained and coerced members of the bargaining unit on strike in their rights under the Act.²

In support of this allegation, the Union asserts that one Hufford was promised super-seniority when he was employed during the strike commencing on September 19, 1961, and that the same promise had been made to all other employees in the composing room hired during said strike. Further, that the Employer's president, Zimmerman, lent certain monies to employees in October 1962, when it appeared that the strike might be ended by an agreement between the Employer and the Union.

The alleged promises of super-seniority made to composing room employees at time of hire, even if true, may not be considered here since all of these employees (except Lorenz and Whitney) were hired prior to the filing of the petitions herein. The same holds true with regard to the alleged lending of monies by President Zimmerman in October 1962. See *The Ideal Electric and Manufacturing Company*, 134 NLRB 1275. Regarding Lorenz and Whitney, there is no evidence to support the Union's allegation.

Since the filing of the petitions herein and on February 12, 1963, the Union filed unfair labor practice charges; Case No. 17-CA-2118. After investigation, the Regional Director found the charges lacked merit and refused to issue complaint concerning the allegations con-

¹ By letter of September 23, 1963, counsel for the Union was requested to advise exactly what was covered by each of the six numbered contentions on which the objections are based. Until this date no reply has been received.

² No ruling on any alleged unfair labor practices can or will be made here. The facts involved will, to the extent permissible, be considered to determine whether or not they tended to, or did, interfere with the election.

tained therein. This refusal was sustained by the General Counsel on July 17, 1963. The Union's request for reconsideration dated July 23, 1963, was denied on August 12, 1963, the General Counsel affirming his earlier ruling. Thus, in the absence of sufficient evidence to support an administrative finding that the Employer has engaged in unfair labor practices, the conclusion must now be reached that no such practices have been committed. In any event, it is consistent Board policy that charges of unfair labor practices will not be disposed of in representation matters. This, obviously, does not preclude consideration of facts which, while conceivably evidence of unfair labor practices, tended to or did interfere with the election. The investigation has failed to disclose any such facts.

Accordingly, this particular objection is without merit.

Allegation 2: The challenges of the strikers by the Employer were improper, and not for just cause.

This allegation appears to be based on the assertion that the challenges to the ballots cast by the strikers should be overruled since the individuals concerned were eligible as strikers who had not been permanently replaced. This contention actually goes to the voting eligibility of the strikers who cast challenged ballots; it is not properly an objection. It is, therefore, found that this particular assertion is non-meritorious.

The eligibility status of the individuals referred to as strikers will be determined below.

Allegation 3: The Employer was not a proper party to challenge voters.

The Union took the position that the Employer was not a proper party to the proceeding, that it had taken over the principal role at the election, that it should have remained completely neutral, and that it had no authority whatever to challenge any putative voter. In substance, this is the same position the Union took during the hear-

ing herein, namely, that the Employer should not participate in the proceeding but that its participation, if any, should be limited to a specific interest shown. This contention was resolved adversely to the Union at that time, and I am affirming such resolution now. Moreover, Section 102.69(a) of the Board's Rules and Regulations, Series 8, as amended, specifically provides, in part, that *any party* may challenge the eligibility of any person to participate in the election. Accordingly, this objection is overruled as being devoid of merit.

Allegation 4: The Employer, through its agents, coerced Thelma Dietz and prevented her from casting a ballot in the election.

The investigation indicates that Mrs. Dietz was asked by friends to vote in the election herein, and that, pursuant to their requests, she proceeded to the election place. However, upon arriving there she decided not to vote. There is no evidence that her decision was other than voluntary. More specifically, no evidence has been discovered showing or tending to show that there was either a threat or any coercion designed or tending to prevent her from casting her ballot. I find that the evidence does not support this allegation. Thus, this objection has no merit.

Allegation 5: The ballots of the people who voted in the plant should not be counted as they were not permanent replacements for economic strikers, but rather were temporary and casual employees and have taken the jobs of unfair labor practice strikers.

This assertion goes to the eligibility status of certain individuals who cast challenged ballots. Again, as has been done with regard to objection 2, I find this particular allegation to be without merit since, in effect, it goes to the eligibility status of the individuals concerned which will be ruled on below.

Allegation 6: The direction of the election was contrary to law.

In essence, this allegation appears to claim that the Union was not accorded due process of law. Suffice it to point out that the same issue was litigated, as stated above, and resolved against the Union. Accordingly, this objection is similarly without merit.

During the investigation the Union advanced two additional allegations of allegedly improper conduct. First, it alleges that the Employer had, for about two days prior to the election, posted a separate notice next to the Board's notice of election, that this notice contained improper material, and that it was removed only immediately before the election. Second, that two named individuals engaged in improper electioneering at the time of and/or immediately prior to the election. Although these allegations were made after the time for the filing of objections had expired they were investigated. Regarding the first allegation, the evidence shows that the Employer did post a notice next to the official notice of election. It was dated August 27, 1963, or the day immediately prior to the election, and reads as follows:

ALL COMPOSING AND MAIL ROOM EMPLOYEES

Since the N. L. R. B. election is scheduled from 3:30 p.m. to 4:30 p.m. tomorrow, it would be appreciated if the employees on the first shift would vote immediately after work and employees on the second shift would vote immediately prior to the start of their shift.

The company certainly hopes that all employees exercise their right to vote so that the results of the election will represent the will of the majority.

The notice was removed at about one o'clock in the afternoon of the election day, August 28, 1963, by an employee who had been instructed to that effect previously by a responsible official of the Employer. Nothing in the notice or in its posting would seem to warrant setting aside

this election. Regarding the second allegation, that is, improper electioneering, the investigation failed to reveal any evidence that such electioneering took place. It has not been sustained.

On the basis of the foregoing, I find and conclude that the objections to the election are without merit in their entirety. Accordingly, they are hereby overruled.

FINDINGS AND CONCLUSIONS ON CHALLENGED BALLOTS

As stated above, there were 68 ballots cast, all of which were challenged. The ballots of thirty-four individuals were challenged by the Employer³ for the reason that their names were not shown on the eligibility list. The ballots of four of them were also challenged for the additional reason that the individuals casting them had been terminated and replaced.⁴ The Union challenged the ballots of the remaining thirty-four individuals,⁵ alleging that all of them were temporary and/or casual employees or replacements for unfair labor practice strikers. In addition, the Union challenged the ballots of eleven of these employees⁶ for certain specified reasons.

The strike herein began on September 19, 1961. The Union asserts that the individuals actually at work in the unit are replacements for unfair labor practice strikers. Thus, in effect, the Union asserts that the strike was an unfair labor practice strike. As indicated above, no such finding may be made in this proceeding. Moreover, as pointed out above, the General Counsel has declined to proceed on the charge filed by the Union in connection with the matters here involved. Thus, for all

³ See Appendix A for an alphabetical listing of the employees involved.

⁴ Leslie Barnett, L. J. Biggs, Billy Runnels, H. D. Hart.

⁵ See Appendix B for an alphabetical listing of the employees involved.

⁶ Alice Cotton, Harlon Elsasser, Marjorie Houseworth, Maggie Langston, Fred J. Lorenz, Mary Nichols, Velma Jane Patz, Richard Schian, Francis Smysor, Joe E. Swadley, and Robert R. Whitney.

present purposes the strike here involved must be considered an economic strike, and the strikers economic strikers.

Even assuming that the strike is still current, it is clear that the thirty-four employees challenged by the Employer are not qualified to vote in the election here involved, pursuant to the provision of Section 9(c)(3) of the Act. This is so because the strike involved commenced more than 12 months prior to the election. If these individuals have been permanently replaced prior to the date of the election, they would be ineligible to vote as specifically set out in the Direction of Election herein. Thus, it must be determined whether or not these employees have been permanently replaced. This obviously involves a determination of the status of the employees actually at work in the Employer's plant who have been challenged by the Union.

The investigation shows that those employees in the unit who, during the strike, were either newly hired or else transferred into the unit from other departments of the Employer's operations, were so hired or transferred on a permanent basis.⁷ Within days after the beginning of the strike, the Employer began placing advertisements into a local as well as certain other newspapers.⁸ Each of these advertisements stated specifically that permanent positions were available. In addition, each individual so hired was told, in substance, that the Employer desired to employ them as regular, permanent employees, and each

⁷ Certain employees, including Denora Otto, Bonnie Tatham, and Leota Wheeler, abandoned the strike and returned to work. They are obviously eligible voters.

⁸ Advertisements were placed in the newspapers listed on the dates shown: Lawrence Daily Journal-World, of Lawrence, Kansas, September 21, 1961; The Dallas Morning News, September 26 and 27, 1961; The Atlanta Journal and The Atlanta Constitution, of Atlanta, Georgia, September 26, 27, and 28, 1961; The Times-Picayune Pub. Co., of New Orleans, Louisiana, September 26, 1961, and two consecutive times; The Advertiser of Lafayette, Louisiana, October 1, 1961; Scottsbluff (Neb.) Daily Star-Herald, October 3, 1961.

applicant also made it clear that such employment was being sought. Considering the circumstances under which these new employees were hired and certain unit employees were transferred into the unit here involved, the conclusion must be reached that the employees challenged by the Union were employed as regular permanent employees. See *Bowman Transportation, Inc.*, 142 NLRB No. 115. It follows further that, considering the employees challenged by the Employer and the Union, respectively, as groups, the striking employees challenged by the Employer have been replaced by the employees challenged by the Union, unless certain individuals in the two respective groups must be considered eligible or ineligible to vote on the basis of certain facts applicable to them only.*

The discussion below concerns the status of the eleven employees challenged by the Union with regard to whom additional specific contentions have been made; see footnote 6.

Alice Cotton and *Joe E. Swadley* were both challenged also because they were employed and working elsewhere. The evidence shows that Swadley and Cotton, notwithstanding some other employment, were regular employees of the Employer at all times material herein. Both of them must be deemed eligible voters at the election herein.

The Union asserts that *Harlan Elsasser*, being a college student, should be considered a casual employee and be disqualified from voting. Elsasser began his employment with the Employer on September 20, 1961, and has been working a full workweek most of the time since then. Whether or not he notified the Employer that he would resign in order to return to school subsequent to the date of the election herein is immaterial, since he was a qualified voter at the time of the election.

* The Employer asserts that the four employees named above in footnote 4 terminated their employment on various dates not later than sometime during October, 1962. In view of my finding that the entire group of strikers has been replaced, I deem it unnecessary to rule on this contention.

The Union alleges specifically that *Marjorie Houseworth* started to work in February 1963 as a casual employee and has worked only four or five days per month. The investigation shows that Houseworth was hired on October 8, 1962, on the same basis as other employees. Having lower seniority than most other employees, she has worked during certain periods fewer hours than other such individuals. Nonetheless, she worked during 4 pay periods in the fourth quarter of 1962, during 2 pay periods in the first quarter of 1963, during 5 pay periods in the second quarter of 1963, and during 9 pay periods in the third quarter of 1963. She was still employed, on the same basis, during the fourth quarter of 1963. It is found that Marjorie Houseworth is at least a regular part-time employee and has been such since her employment in October of 1962. Accordingly, she is an eligible voter in the election here involved.

The Union asserts that *Maggie Langston* terminated her employment with the Employer. The investigation shows that Langston started work for the Employer on August 17, 1959. She was never permanently laid off prior to her termination on September 20, 1963. During the second quarter of 1963 she worked virtually full time. On June 28, 1963, she requested to be put at the bottom of the seniority list until September 30, 1963, to be with her children during the summer months. She was called in and worked 37½ hours during the payroll period ending July 7, 1963, and 7½ hours during the payroll period ending August 18, 1963. She telephoned the Employer on September 20, 1963, and, as stated above, terminated her employment. Langston must be considered eligible to vote in this election as a regular employee of the Employer.

The Union alleges that *Fred J. Lorenz* and *Robert R. Whitney* were employed on May 23 and 22, 1963, respectively, on a trial basis, and that each of them has only about four years at the trade and is not a qualified journeyman. The investigation revealed that both Lorenz and Whitney were hired by the Employer on or about May 23, 1963, and that each of them worked at least full

time during most of the pay periods thereafter through the date of the election. Even assuming that each of them was hired "on a trial basis to see if [he was] able to do the work," this would not, under the circumstances present here, disqualify them as eligible voters; see *Bowman Transportation, Inc.*, 142 NLRB No. 115, and *Pacific Tile and Porcelain Company*, 137 NLRB 1358. It is so determined.

The Union challenges *Mary Nichols* also as not being on the eligibility list. The investigation shows that Nichols was originally employed on September 20, 1961, and that, in March 1963, she was granted a leave of absence ending on June 2, 1963. She worked during 8 pay periods in the first quarter of 1963, 2 pay periods during the second quarter of 1963, and 11 pay periods during the third quarter of 1963, having resumed her employment upon the termination of her leave of absence. She was an eligible voter in the election here involved.

Regarding *Velma Jane Patz*, the Union asserts that she started working at the beginning of the strike, had a baby in October 1962, spent some time in California, is presently expecting another child, and has been able to do almost no work since June 1963. The investigation reveals that Patz was originally employed on September 20, 1961, and terminated on May 4, 1962. She was rehired as a permanent employee on March 25, 1963, worked 22½ hours during the payroll period ending March 31, 1963, and during 9 payroll periods in the second quarter of 1963. She was granted a 90-day maternity leave of absence from June 27 until September 27, 1963. On these facts, Patz was an eligible voter in this election.

The Union alleges that *Richard Schain* was discharged by the Employer on May 14 and reemployed on May 27, 1963, on a trial basis, dependent on his conduct toward other employees in the composing room. Further, the Union alleges that Schain is a concessionaire at a drive-in theatre and that this operation is his major employment, with his work for the Employer being secondary. The in-

vestigation shows that Schian was originally employed on September 21, 1961, and worked full time during all times material herein, except during the payroll periods ending May 19 and 26, 1963, respectively. While, as a consequence of a certain incident on or about May 14, 1963, Schian walked out of the plant, he returned to his employment within about ten days, pursuant to an arrangement made between him and the Employer. Thus, even assuming Schian quit or was discharged at the time of the incident, he was again an employee of the Employer on both the eligibility and election dates, and he is an eligible voter in this election.

The Union alleges that *Francis G. Smysor*, the Petitioner in Case No. 17-RD-236, is a supervisor within the meaning of the Act. This matter was litigated during the hearing herein, and Smysor was found not to be a supervisor within the meaning of the Act. The evidence fails to show that Smysor's status has changed in any respect material hereto since the date of the hearing. With particular respect to the allegation that Smysor interviewed an applicant for employment, the investigation reveals that while he was introduced to applicants for employment, he did not question either one of the two employees involved concerning his qualifications. He was not asked to, nor did he, make any recommendations regarding the employment of such applicants. On the facts, it must be determined that Smysor was an eligible voter at the election.

Having found the Union's objections to be without merit in their entirety, and having determined the eligibility status of the voters herein, all of whom cast ballots under challenge, I shall direct that the challenged ballots cast by the employees named in Appendix B be opened and counted, but that the challenged ballots cast by the employees listed in Appendix A be disregarded and not be opened and counted in this election.

ORDER

IT IS HEREBY ORDERED that the objections filed by the Union to the election herein be, and they hereby are, overruled.

IT IS FURTHER ORDERED that the challenged ballots cast by the employees listed in Appendix B be opened and counted at a time, date, and place to be announced later, and that an appropriate certification issue based upon the results of said counting.

Dated: January 29, 1964
at Kansas City, Missouri

HUGH E. SPERRY
Regional Director for the 17th Region



IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,247

LAWRENCE TYPOGRAPHICAL UNION No. 570, *Appellant*

v.

FRANK W. McCULLOCH, ET AL., *Appellees.*

On Appeal from the United States District Court for the
District of Columbia

REPLY BRIEF FOR APPELLANT

United States Court of Appeals
for the District of Columbia Circuit

FILED APR 10 1964

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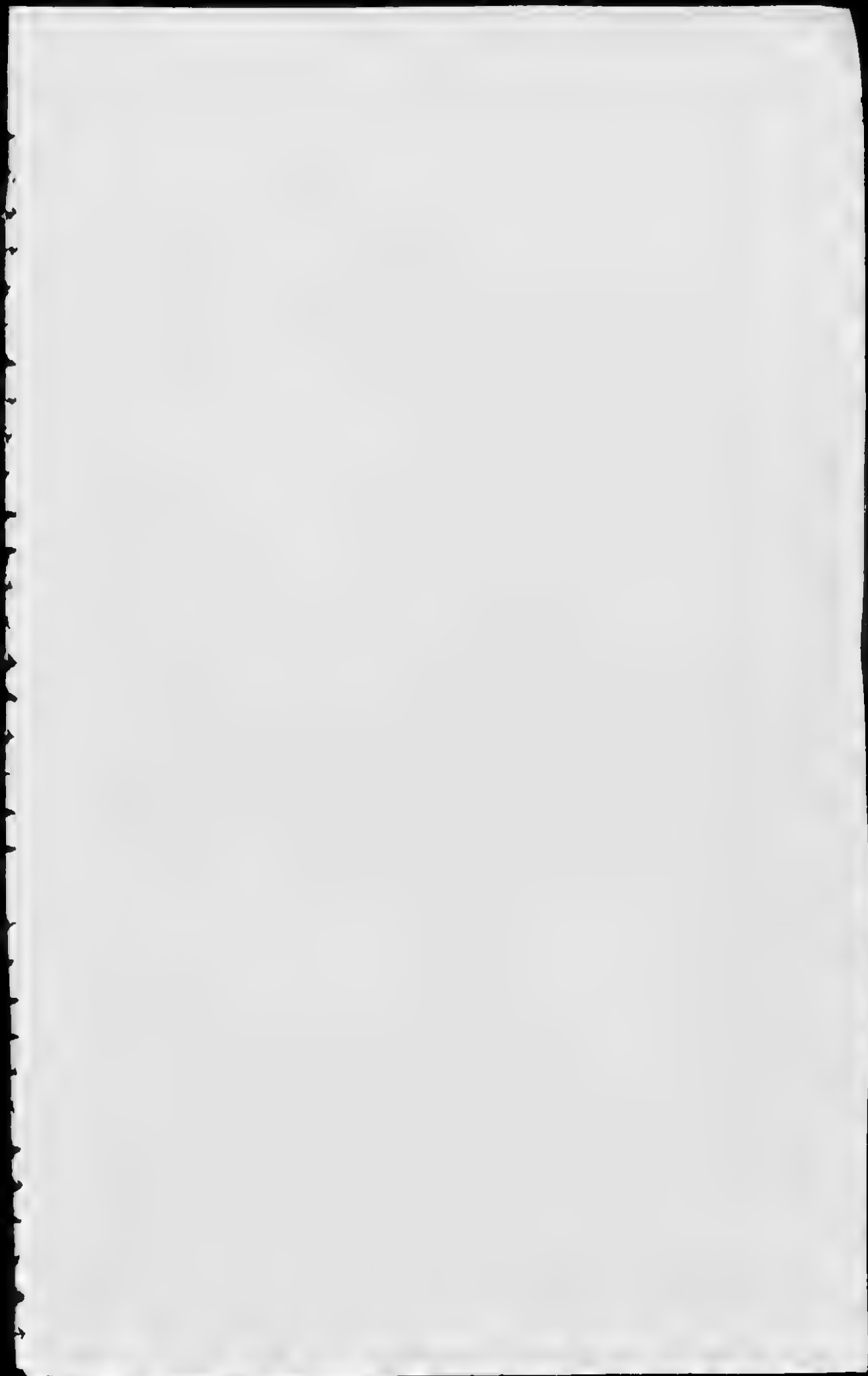
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REPLY BRIEF FOR APPELLANT

I.

In *Dayton Typographical Union No. 57 v. N.L.R.B.*, 326 F. 2d 634 (CA DC, Nov. 14, 1963) petitioner unions urged that employer unfair labor practices may be asserted in defense against a charge that the union has violated Section 8(b)(7)(C) by picketing the employer. The Board, *per contra*, argued that such employer conduct does not excuse a union which is picketing for recognition from filing a representation petition within the prescribed period, and is therefore irrelevant in the 8(b)(7) case. The Board prevailed. This Court held that the employer's unfair labor practices were not a defense and that the statute as so construed was not unconstitutional because the union could file an unfair labor practice charge along with its petition: The proceedings on the charge would

abate the proceedings on the petition; even if no complaint issued on the charge, the union could, in the representation case, present to the Board the evidence of the employer's unfair labor practices.

In the instant case appellant union resisted the direction of a representation election on the ground that the decertification petitions did not raise a question concerning representation under the statute because they were initiated and fostered by the employer. The Board, treating these assertions as "unfair labor practice allegations", refused to consider them and directed an election. The union thereupon brought this suit to enjoin further proceedings pursuant to this direction of election on the ground that the Board had thereby exceeded its statutory and constitutional powers. The Board now states that appellant "would be in a position to avail itself of the special procedure for 8(b)(7) cases discussed" in its brief (Bd. Br., p. 42, n. 32).¹ It is uncertain whether this carefully ambiguous concession refers to the procedure set down by the Second Circuit in *Woodward Motors*² (a trial of the employer's unfair labor practices in the 8(b)(7) case), or that prescribed by this Court in *Dayton* (a trial of the employer's unfair labor practices in the representation case), both of which are discussed in the

¹ The eventuality referred to in the Board's footnote—the filing of an 8(b)(7) charge against the Union—is inevitable once "the final act of certification" (*Inland Empire v. Millis*, 325 U.S. 697, 709) occurs. The regional director has already ruled that the strikers' ballots may not be counted. (See Bd. Br., p. 57 and p. 13, n. 19, *infra*). Since the union is picketing in support of its strike against the employer (see Bd. Br., p. 2), the filing by him of an 8(b)(7) charge must be anticipated; indeed, we surmise—and seek the opportunity to prove—that the employer fostered the decertification petitions with precisely this end in mind.

² *N.L.R.B. v. Local 182, Teamsters*, 314 F. 2d 63 (CA 2). The Court there held that since a valid election was a necessary element of an 8(b)(7) violation, the union had the right to litigate the issue in that proceeding. Of course, it did not foreclose the Board from hearing the issue of validity in the representation case, which is the normal procedure, or from treating as controlling in the 8(b)(7) case, a decision of an issue thus tried.

Board's brief. The first of these alternatives is squarely inconsistent with the Board's position in *Dayton Typographical Union*, which this Court accepted, that an employer unfair labor practice may not be raised as a defense in an 8(b)(7) case. The other alternative is that the issue be tried in the representation case. That position is in accord with this Court's holding in *Dayton* and is the precise relief which appellant seeks in this suit, but which the remainder of the Board's brief resists. Thus, unless the Board's final footnote is to be taken as a confession of error, its positions here and in *Dayton* add up to this: A picketing union is entitled to litigate the employer's unfair labor practices, but always in the *other* proceeding. Compare Carroll, *Alice Through the Looking-Glass*.³

Since the Board concedes at the least that appellant is entitled to try its allegation that the employer sponsored the decertification petitions in *some* proceeding, notwithstanding the General Counsel's refusal to issue a complaint, the considerations of administrative convenience or comity to which it makes repeated but generalized reference can be of little moment. Even if these considerations had merit originally, as they plainly did not (Union Br., pp. 15-17, 25-32), the enactment of Section 8(b)(7) has rendered them obsolete, as the Board appears reluctantly to acknowledge (Bd. Br., pp. 39-42). In terms of the policy sought to be furthered by *Times Square*, it matters naught whether the Board passes on allegations (which the Board mistakenly considers "review" of the General Counsel's determination) in a representation case or an 8(b)(7) case. It is, of course, more appropriate that facts affecting validity of elections—no matter how characterized—be tried in representation proceedings, which are designed for

³ "The rule is, jam to-morrow, and jam yesterday—but never jam to-day."

"It must come sometimes to 'jam to-day,'" Alice objected.

"No, it can't," said the Queen. "It's jam every other day: to-day isn't any other day, you know."

Carroll, *Alice Through the Looking-Glass*, Chapter 5.

that purpose, so that they may be correctly decided before certification. In any event, this Court squarely held in *Dayton* that a picketing union could, in a representation hearing, resist the direction of an election on the ground of unfair labor practices committed by the employer. In so holding, the Court was fully cognizant of the General Counsel's discretionary authority with regard to issuance of complaints (see 326 F. 2d at 648, n. 24) as well as the Board's *Times Square* rule.⁴ Because of that authority the Court considered the protections which it afforded the union to be essential to preserve the constitutionality of the statute as administered.

Somewhat inconsistently with its final footnote the Board appears to argue that appellant union does not qualify for a hearing under *Dayton*. It is suggested (Bd. Br., pp. 40-41) that the union's offer of proof at the hearing was inadequate. But the union not only specified in that offer that it was alleging that the employer had fostered the decertification petitions, but, as the District Court found, unsuccessfully attempted to question witnesses respecting the employer's fostering of the decertification petitions. (JA 27). Thus, the Board is mistaken when it says that the union "did not specify the particular employer conduct that was supposed to warrant dismissal of the decertification petitions." (Bd. Br., p. 41.)⁵ The Board also objects that the union did not "challenge the propriety of the General Counsel's determinations as such." (Bd. Br., p. 41.)⁶ Of course not. The determina-

⁴ See Brief for Petitioner, CADC, No. 17,058, pp. 46-50, particularly p. 48, n. 32; Brief for National Labor Relations Board, *id.* pp. 43-45; Petitioner's Supplemental Memorandum, *id.* p. 6, n. 5; p. 7, n. 6.

⁵ The case is in this regard unlike *Woodward Motors* where apparently the union merely offered in evidence at the representation hearing the charges which the General Counsel had dismissed. 314 F. 2d 60-61.

⁶ This assertion, which is correct, is inconsistent with an earlier statement, which is not correct, that "appellant's action is, in reality, an attempt to secure circuitous review of the General Counsel's refusal to issue a complaint." (Bd. Br., p. 37.)

tion "as such" is the General Counsel's refusal to issue a complaint; it is precisely—and exclusively—that determination which § 3(d) immunizes from review by Court or Board. (See the decisions cited at Bd. Br., p. 33, n. 26 and *Sunbeam Plastics Corp.*, 144 NLRB No. 96, n. 1). But the fact that the union did not perform a legally futile act is irrelevant since the *Dayton* case does not require the union to do so before it may litigate employer unfair labor practices at a representation proceeding.

Bd. br. p. 41 also claims that the union "does not suggest why the ^{resolution} litigation of an issue in a representation proceeding should be different from that reached in the investigation of the unfair labor practice charge." No such showing was required by *Dayton*, doubtless because the reason is obvious, but we shall be glad to explain it to the Board. We believe that by confrontation and cross-examination of the company representatives, the decertification petitioners, and other knowledgeable parties at a hearing, we are likely to develop facts which the General Counsel was unable to uncover in his *ex parte* investigation. In short, we reject the notion that "such concepts as 'confrontation' and 'cross-examination' have little significance in a representation context" (Bd. Br., p. 34) and embrace rather the "belief that no safeguard for testing the value of human statements is comparable to that furnished by cross-examination". 5 Wigmore, *On Evidence* (3d ed. 1940) § 1367, quoted with approval in *Greene v. McElroy*, 360 U.S. 474, 497.⁷

In light of *Dayton* and the Board's concession compelled thereby, we submit that the case ends here. Only the briefest discussion of the other issues raised by the Board's brief is therefore warranted.

⁷ One of the most significant omissions in the Board's brief is its failure to comment on the *Greene* decision, upon which appellant heavily relied, both on the constitutional issue and for the principle that grants of authorization to administrative agencies should be construed if possible to require that parties be afforded the traditional safeguards of confrontation and cross-examination. (Union Br., pp. 23-25).

II

A. Since the basis of judicial review of Board representation proceedings under *Leedom v. Kyne*, 358 U.S. 184, is well settled and has been applied in numerous cases by this Court, we need not pursue the Board's elaborate discussion of this subject. (Bd. Br., pp. 13-21).⁸ But each of the cases on which the Board relies is based on the wide discretion which the Board has for formulating substantive rules for the application of its contract bar doctrine or for determining the appropriate unit; none dealt with the requirements that the Board "shall provide an appropriate hearing" and make findings only "upon the record of such hearing." As this Court recently demonstrated in *Miami Printing Pressmen's Union, etc. v. N.L.R.B.*, 322 F. 2d 993, 996-998, the fundamental distinction on which reviewability turns is between matters committed to the Board's discretion and those which Congress has forbidden or made mandatory. Under that decision, review is clearly available to the union here, for it relies on a statutory provision, § 9(c)(1), which embodies congressional commands regarding the procedures which must be followed before the Board is empowered to direct an election. *Kearney & Trecker Corp. v. N.L.R.B.*, 209 F. 2d 782 (CA 7); *J. I. Case Co. v. N.L.R.B.*, 201 F. 2d 597 (CA 9).

Kearney & Trecker, supra, held that the Board is "commanded to make its decision from what it finds 'upon the record of such hearing'". The Board does not contend

⁸ *Boire v. Greyhound Co.*, 376 U.S. , 32 Law Week 4224, decided March 23, 1964 effected no change in the *Kyne* doctrine. Greyhound had sought District Court review of a Board determination that it possessed sufficient indicia of control to be an employer within § 2(3) of the Act. The Court held this to be "essentially a factual issue, unlike the question in *Kyne*, which depended solely upon construction of the statute." 32 LW at 4226. Accordingly it disallowed review: "The *Kyne* exception is a narrow one, not to be extended to permit plenary District Court review of Board orders in certification proceedings whenever it can be said that an erroneous assessment of the particular facts before the Board has led it to a conclusion which does not comport with the law." *Id.* Here, of course, there is no factual issue; decision depends solely upon construction of § 9(c)(1) of the Act and the Fifth Amendment.

that this case was wrongly decided. It says rather that "the issue of employer initiation and fostering of decertification petitions is not determined in a representation proceeding any more than it is litigated there." (Bd. Br., p. 24). This assertion is refuted in the brief itself: "appellant's charge of employer initiation and fostering of the decertification petitions would, if true, constitute a basis * * * for dismissal of the petitions *in the representation proceeding*. See *Sperry Gyroscope*, 136 NLRB 294, 297." (Bd. Br., p. 10, emphasis supplied).⁹ This same statement likewise contradicts Board Brief, p. 21 where it is contended that the Board here "held a representation hearing in which it permitted litigation of all relevant *representation* issues". For it matters not to the relevance of an allegation which would affect the result in a representation proceeding that the same allegation would also "constitute a basis for issuance of an unfair labor practice order against the employer" (Bd. Br., p. 10).¹⁰ See Union Br., pp. 14-16, and compare *United States v. R. C. A.*, 358 U.S. 334.

⁹ Although again citing *Sperry Gyroscope*, Bd. br. p. 24 omits the key phrase "in the representation proceeding" in a transparent effort to transmute the denial of a hearing into a rule of substantive law.

¹⁰ The Board's brief claims that "in the Board's view there is a precise coincidence of issues" between the allegation that an employer has initiated decertification petitions and that they therefore do not raise a question concerning representation, and the allegation that the employer initiated decertification petitions and thereby violated Section 8(a)(1) of the Act (Bd. Br., p. 10). This assertion, which is elevated to the status of a matter "of course" at Bd. Br., p. 38, n. 30, has never been stated by the Board to be its view, is not supported by the cases cited in the brief, and is inaccurate. The Board's rule that a decertification petition sponsored by an employer does not raise a question of representation is based on its construction of Section 9(c)(1)(A) of the Act. "The precise language of Section 9(c)(1)(A) of the Act indicates clearly that decertification proceedings provide a remedy exclusively for and on behalf of employees, and not of employers." *Morganton Full Fashioned Hosiery Co.* 102 NLRB 134, citing *Clyde J. Merriis*, 77 NLRB 1375. The rule that an employer's fostering of a decertification petition violates 8(a)(1), on the other hand, derives from decisions antedating the Taft-Hartley Amendments which held it to be an unlawful interference with Section 7 rights for the employer to take any part of promoting the repudiation of their bargaining representative by his employees. It therefore does not depend on the form of the petition. See e.g., *N.L.E.B. v. Birmingham Publishing Co.*, 262 F. 2d 2, 7 (CA 5).

The Board contends that our construction of the upon the record requirement "proves too much" because it would require litigation in a representation hearing of issues already determined after full complaint and hearing by the Board (Bd. Br., pp. 29-30). Assuming that an issue already tried and determined in a hearing after a complaint could subsequently become relevant in a representation proceeding,¹¹ the Board would be free to treat such an issue as *res judicata*. But *res judicata* is a principle of general application, implicit in all statutes authorizing tribunals to try particular issues. Recognition of this principle cannot render nugatory the statutory requirement of a decision "upon the record of a hearing" of issues which are not *res judicata*, such as those which have only been the subject of charges before the General Counsel. (See Union Br., pp. 29-32).¹²

¹¹ The examples given by the Board in the text (Bd. Br., p. 30) are unrealistic because in each instance the remedy in the unfair labor practice case would obviate the need for a representation hearing. For example, if a union has been found to be dominated "the Board usually orders the complete disestablishment of the union so that it can never be certified by the Board". *United Mine Workers v. N.L.E.B.*, 355 U.S. 453, 458.

¹² Even if the refusal of the General Counsel to issue a complaint "was premised solely on the lack of factual support for appellant's allegations and did not depend on policy or budgetary considerations unrelated to the merits of the case" (Bd. Br., p. 36), his conclusion, rendered without a hearing, may not be given *res judicata* effect. *Postal Telegraph Cable Co. v. Newport*, 247 U.S. 464, 475-476; *Griffin v. Griffin*, 327 U.S. 220, 229, cited at union br. pp. 31, 32. To refer to the proceedings before the General Counsel as "litigation of issues" in a "forum" (Bd. Br., pp. 11, 25) is to distort these concepts by ignoring what is perhaps the most fundamental procedural distinction in the law—that between an investigation and a hearing.

Moreover, we submit (contrary to the implication at Bd. Br., p. 36) that "policy or budgetary considerations" are directly related "to the merits of the case" when the General Counsel is determining whether factual allegations are sufficient to warrant the issuance of a complaint. Budgetary reasons make it impossible to proceed to hearing on all charges which are supported by evidence. In determining in any case whether evidence is sufficient to warrant the issuance of a complaint, the General Counsel necessarily considers not only the likelihood of success, but the relative importance of the case in effectuating the purposes of the Act.

The Board would avoid the authority of the construction of Section 9(c)(1) in *J. I. Case Co. v. N.L.R.B.*, *supra*, on the ground that this case "arose under the normal review procedures established in Section 10(e) and (f) of the Act. Consequently, the court, in enumerating issues that might be the subjects of an appropriate hearing under Section 9(c), was exploring the scope of that provision as a matter of statutory interpretation, not enunciating a clear statutory command." (Bd. Br., p. 22) We are unaware of any rule of *stare decisis* that a court's considered interpretation of a statute in one form of proceeding is not an authoritative precedent when the same question arises in another type of proceeding.¹³

Similarly, we think the distinction between "statutory interpretation" and "enunciating a clear statutory command" (Bd. Br., p. 22) is probably meaningless, and certainly unworkable, as a rule of precedent. It is enough to ask of courts that they decide cases; they cannot be called upon to specify the degree of certitude of their decisions.

The Board, leaning heavily on the word "appropriate" in derogation of the word "hearing", contends that the requirement that it "shall provide an appropriate hearing" in Section 9(c)(1) is discretionary with it. (Bd. Br., pp. 22, 23). But whatever discretion the word "appropriate" may give the Board with regard to the form of a hearing, it does not license the Board to disallow the litigation of issues relevant in the representation proceeding. As the Court demonstrated in *J. I. Case*, while Section 9(c)(1) requires no hearing as to other matters, a hearing is "appropriate and necessary" as to any "element in determin-

¹³ If such a rule prevailed, the Supreme Court would have been in error in *Sociedad Nacional v. McCulloch*, 372 U.S. 10, when it followed *Bens v. Compania Naviera Hidalgo*, 353 U.S. 138, which was a civil suit between private parties.

ing whether or not a question of representation exists". 201 F. 2d at 600. Of course, the Section does not undertake to define "the elements which are essential to . . . determining whether or not a question of representation exists", *id.*, quoted and relied on at Bd. Br., pp. 22-23. But once the Board has exercised its conceded discretion in this regard, it must afford a hearing as to each of the elements which it has defined.¹⁴ Moreover, the existence of some discretion does not render unreviewable all the Board determinations of what constitutes an appropriate hearing. In *Miami Pressmen* the Court held that on the facts before it, Section 9(c)(1) imposed "a mandatory duty on the Board to certify the results of an election"; yet the Court recognized that the same clause on which it relied "is not mandatory in all instances" because the Board is not required to certify even after hearing the results of an election which has been unfairly conducted. See 322 F. 2d 993 at 997, 998.

In short, while the Board has wide discretion in formulating "procedures" for the conduct of elections (*N.L.R.B. v. A. J. Tower Co.*, 329 U.S. 524, Bd. Br., pp. 23, 31), "specification of [the] proper forum of procedure for the litigation of particular issues" (Bd. Br., p. 25) has already been accomplished by Congress. In enacting Section 9(c)(1), it empowered the Board to direct an election only after providing a hearing upon which the existence of a question of representation could be litigated.¹⁵ This Congressional policy cannot be defeated by the

¹⁴ Thus, while the Board has broad discretion in formulating contract bar rules (see the cases cited at Bd. Br., pp. 17-19), one of the subjects for inquiry defined by the Court in *J. I. Case* is "whether there is any subsisting bargaining contract which would operate as a bar to an election". 201 F. 2d at 600.

¹⁵ The Board does not explain how Section 3(d), in which it finds "support", but not a command, for its *Times Square* policy, and which refers solely to the General Counsel's authority under Section 10, can modify this duty of the Board under Section 9. Thus, we need not expand on the discussion of this issue in our opening brief.

Board's "policy decision on case-handling procedures" (Bd. Br., p. 25). Compare *Colgate Co. v. Labor Board*, 338 U.S. 355, 363.¹⁶

B. On the constitutional issue the Board relies predominantly on *Federal Communications Commission v. WJR*, 337 U.S. 265 and *Cafeteria and Restaurant Workers v. McElroy*, 367 U.S. 886, 894. *WJR* is plainly inapposite. There the Court said: "Respondent does not contend that it was denied any opportunity to present for the Commission's consideration any matter of fact or law in connection with its application or that the Commission has not given all matters submitted by it due and full consideration." 337 U.S. at 284. In this case, on the other hand, the union was denied all opportunity to obtain the Board's consideration of an issue of fact which could have determined the outcome of the proceeding.

In *Cafeteria Workers* the Court undertook a balance "of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." 367 U.S. at 895. The Court defined the private interest as follows: "All that was denied [Rachel Brawner] was the opportunity to work at one isolated and specific military installation". *Id.* at 896. On the other side, in the Court's view, "The governmental function operating here was not the power to regulate or license, as lawmaker, an entire trade or profession, or to control an entire branch of private business, but, rather, as proprietor, to manage the internal operation of an important federal military establishment." *Id.*

¹⁶ The Board is driven back to an argument of necessity. (Bd. Br., p. 31). But a decision favorable to appellant "would play havoc with the rules adopted by the Board over the years" (*id.*), only in so far as these rules are in conflict with law. The dislocations which the Board concedes have been wrought by Section 8(b)(7) would alone deprive this argument of what little weight to which it otherwise would be entitled. Moreover, the Board's brief does not describe what "havoc" was "wrought" in the six years in which it allowed litigation of employer sponsorship of decertification petitions in representation proceedings.

By the *Cafeteria Workers* test due process was clearly denied here. The Board's powers in a proceeding under Section 9 of the Act cannot be equated with those of the government in its proprietary military capacity where, as the Court held in *Cafeteria Workers*, it "has traditionally exercised unfettered control".¹⁷ 367 U.S. at 896. And the interests of the union and its members are far more substantial than that of Rachel Brawner, as the court viewed that interest. *Id.*

The Board deprecates the union's interest in the outcome of a representation proceeding (Bd. Br., pp. 33-35); but it is plainly very substantial. Perhaps the most important function of a union is that of bargaining representative.¹⁸ A final certification of results would deprive

¹⁷ Bd. Br. pp. 34-35 seriously misstates the Board's function in a Section 9 proceeding. If "the interest of the public in preventing industrial unrest through the provision of machinery for promptly and accurately registering employee free choice" were alone involved ~~in~~ Section 9 of the Act, Congress would not have needed to condition the holding of an election on the determination that there is a question of representation. But Congress did limit the Board's authority for holding elections to circumstances in which such a finding could be made, and required a hearing preliminary to such a finding, though it knew full well that such hearings could be time consuming. Particularly where the Board's machinery registers the choice of only some of the employees and thus deprives other employees of their right to continue to be represented (see n. 19, *infra*) this requirement seems a wise precaution.

¹⁸ In *National Maritime Union v. Herzog*, 78 F. Supp. 146, (D.C.D.C.) affirmed, 334 U.S. 854, especially relied on by the Board (Bd. br. pp. v, 35) the Court held that a union does not have a constitutional right to be an exclusive bargaining representative. We do not dispute this proposition, but, as even *Cafeteria Workers* teaches, the question of due process cannot be answered by the "easy assertion" that the union had no substantive constitutional right in the first place. "One may not have a constitutional right to go to Baghdad, but the Government may not prohibit one from going there unless by means consonant with due process of law." 367 U.S. at 894, quoting with approval *Homer v. Richmond*, 110 U.S. App. D.C. 226, 229, 292 F. 2d 719, 722. See also *Willner v. Committee on Character*, 373 U.S. 96, 103 quoting with approval *Goldsmith v. Board of Tax Appeals*, 270 U.S. 117, 123.

appellant of that right without ever affording it the opportunity to establish at a hearing that it has been the victim of employer unfair labor practices.¹⁹ Additionally, in the immediate context of this case, the effect would be to break the union's strike, which, of course, it is pursuing in its interest in preserving union conditions not only at Kansas Color Press but in the community. Cf. *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 503. Moreover, this suit was brought by the union not only in its own behalf but also on behalf of its members (JA 2). The interest of the members is not discussed at all by the Board and is indeed painstakingly elided from the passage in our opening brief on which the Board predicates almost its entire constitutional argument:

"Congress may predicate the availability of a new public remedy on the results of an *ex parte* investigation and the exercise of discretion by a government official. But the right of a union to continue as a bargaining representative, *or of its members to be represented by their union*, may not constitutionally be conditioned on the outcome of a proceeding in which the union is not allowed to confront and cross-examine adverse witnesses." (Union Brief, p. 23, n. 16, quoted at Bd. Br., p. 33 by omitting the passage here emphasized).

Thus, the Board does not contend that the members' interest in the outcome of the representation proceeding is

¹⁹ The union also has charged that its strike is due to the employer's unlawful insistence on illegal or non-bargainable subjects, cf. *Labor Board v. Borg-Warner*, 356 U.S. 342. The General Counsel's refusal to issue a complaint on that allegation was based on the six-months statute of limitations. (JA 18). Though this statute is not applicable to representation proceedings, the Regional Director denied the union a hearing on that issue when it became relevant in determining whether appellant's members are eligible to vote as unfair labor practice strikers. See Bd. br. pp. 56-57. Thus, by operation of *Times Square* (see un. br. p. 27, n. 17), and § 9(c)(3) these employees (see § 2(3)) were deemed ineligible to vote. It adds irony to injury when procedures which achieve such results without a hearing are described as "accurately registering employee free choice" (Bd. br. p. 34).

insufficient to entitle them to the traditional procedural safeguards of due process. This case involves their right "to self-organization and to select representatives of their own choosing for collective bargaining", which "is a fundamental right". *N.L.R.B. v. Jones and Laughlin Corp.*, 301 U.S. 1, 33; *Amalgamated Utility Workers v. Consolidated Edison Co.*, 309 U.S. 261, 263. See also *Consolidated Edison Co. v. N.L.R.B.*, 305 U.S. 197, 238. Moreover, since decertification would result in breaking of the strike, the case involves the members' right to return to their jobs, and their employment conditions if they do return. Their situation is thus in sharp contrast to that of Rachel Brawner in *Cafeteria Workers* who "remained entirely free to obtain employment as a short-order cook or to get any other job, either with M & M or with any other employer." 367 U.S. at 896.

Finally, it neither clarifies analysis nor advances the Board's constitutional argument to proclaim that representation proceedings are "non-adversary" (Bd. Br., pp. 33-34). Such characterizations have not in the past foreclosed inquiry into the nature of the interest affected or of the procedural right claimed. Compare *Morgan v. United States*, 304 U.S. 1, 20; *Inland Empire v. Millis*, 325 U.S. 697, 706. Here the union was denied not only confrontation and cross-examination of adverse witnesses, but any "opportunity to present its case and be heard in its support." *Brinkerhoff-Faris Trust and Savings Co. v. Hill*, 281 U.S. 673, 681.

CONCLUSION

The judgment below should be reversed with instructions to declare the Board's Direction of Election null and void, and to enjoin further proceedings pursuant to said Direction of Election.

Respectfully submitted,

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NATIONAL LABOR RELATIONS BOARD

RULES AND REGULATIONS

AND

STATEMENTS OF PROCEDURE

SERIES 8, AS AMENDED

**LABOR MANAGEMENT RELATIONS ACT, 1947
AS AMENDED SEPTEMBER 14, 1959**



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NATIONAL LABOR RELATIONS BOARD

RULES AND REGULATIONS AND STATEMENTS OF PROCEDURE SERIES 8, AS AMENDED

The National Labor Relations Board issued its Rules and Regulations and Statements of Procedure, Series 8, on November 4, 1959. They were published in the Federal Register on November 7, 1959 (24 F.R. 9095), and became effective on November 13, 1959. Amendments were issued by the Board and were published in the Federal Register and became effective on May 4, 1961 (26 F.R. 3885), on August 15, 1961 (26 F.R. 7546), on March 3, 1962 (27 F.R. 2091), and on June 1, 1962 (27 F.R. 5094).

The Rules and Regulations and Statements of Procedure, Series 8, as amended, shall be in force and effect until amended or rescinded by the Board.



NATIONAL LABOR RELATIONS BOARD

RULES AND REGULATIONS

SERIES 8, AS AMENDED—PART 102

Subpart A—Definitions

SECTION 102.1 *Terms defined in section 2 of the act.*—The terms “person,” “employer,” “employee,” “representative,” “labor organization,” “commerce,” “affecting commerce,” and “unfair labor practice,” as used herein, shall have the meanings set forth in section 2 of the National Labor Relations Act, as amended by title I of the Labor Management Relations Act, 1947.

SEC. 102.2 *Act; Board; Board agent.*—The term “act” as used herein shall mean the National Labor Relations Act, as amended. The term “Board” shall mean the National Labor Relations Board and shall include any group of three or more members designated pursuant to section 3(b) of the act. The term “Board agent” shall mean any member, agent, or agency of the Board, including its general counsel.

SEC. 102.3 *General counsel.*—The term “general counsel” as used herein shall mean the general counsel under section 3(d) of the act.

SEC. 102.4 *Region.*—The term “region” as used herein shall mean that part of the United States or any Territory thereof fixed by the Board as a particular region.

SEC. 102.5 *Regional director; regional attorney.*—The term “regional director” as used herein shall mean the agent designated by the Board as regional director for a particular region. The term “regional attorney” as used herein shall mean the attorney designated by the Board as regional attorney for a particular region.

SEC. 102.6 *Trial examiner; hearing officer.*—The term “trial examiner” as used herein shall mean the agent of the Board conducting the hearing in an unfair labor practice or Telegraph Merger Act proceeding. The term “hearing officer” as used herein shall mean the agent of the Board conducting the hearing in a proceeding under section 9 or in a dispute proceeding under section 10(k) of the act.

SEC. 102.7 *State.*—The term “State” as used herein shall include the District of Columbia and all States, Territories, and possessions of the United States.

SEC. 102.8 *Party.*—The term “party” as used herein shall mean the regional director in whose region the proceeding is pending and any person named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any Board proceeding, including, without limitation, any person filing a charge or petition under the act, any person named as respondent, as employer, or as party to a contract in any proceeding under the act, and any labor organization alleged to be dominated, assisted, or supported in violation of section 8(a) (1) or 8(a) (2) of the act; but nothing herein shall be construed to prevent the Board or its designated agent from limiting any party to participate in the proceedings to the extent of his interest only.

Subpart B—Procedure Under Section 10(a) to (i) of the Act for the Prevention of Unfair Labor Practices¹

CHARGE

SEC. 102.9 *Who may file; withdrawal and dismissal.*—A charge that any person has engaged in or is engaging in any unfair labor practice affecting commerce may be made by any person. Any such charge may be withdrawn, prior to the hearing, only with the consent of the regional director with whom such charge was filed; at the hearing and until the case has been transferred to the Board pursuant to section 102.45, upon motion, with the consent of the trial examiner designated to conduct the hearing; and after the case has been transferred to the Board pursuant to section 102.45, upon motion, with the consent of the Board. Upon withdrawal of any charge, any complaint based thereon shall be dismissed by the regional director issuing the complaint, the trial examiner designated to conduct the hearing, or the Board.

SEC. 102.10 *Where to file.*—Except as provided in section 102.33 such charge shall be filed with the regional director for the region in which the alleged unfair labor practice has occurred or is occurring. A charge alleging that an unfair labor practice has occurred or is occurring in two or more regions may be filed with the regional director for any such regions.

SEC. 102.11 *Forms; jurat; or declaration.*—Such charge shall be in writing and signed, and either shall be sworn to before a notary public, Board agent, or other person duly authorized by law to administer oaths and take acknowledgments or shall contain a declaration by the person signing it, under the penalties of the Criminal Code, that its contents are true and correct to the best of his knowledge and belief.

¹ Procedure under sec. 10(j) to (l) of the act is governed by subparts F and G of the Rules and Regulations. Procedure for unfair labor practice cases and representation cases under sec. 8(b) (7) of the act is governed by subpart D.

Three additional copies of such charge shall be filed together with one additional copy for each named party respondent.²

SEC. 102.12 *Contents.*—Such charge shall contain the following:

(a) The full name and address of the person making the charge.
 (b) If the charge is filed by a labor organization, the full name and address of any national or international labor organization of which it is an affiliate or constituent unit.

(c) The full name and address of the person against whom the charge is made (hereinafter referred to as the "respondent").

(d) A clear and concise statement of the facts constituting the alleged unfair labor practices affecting commerce.

SEC. 102.13 *Note.*—This section, which in Series 7 of the Rules and Regulations related to the filing requirements of section 9(f), (g), and (h) of the Labor Management Relations Act, was eliminated by amendments effective September 14, 1959. To avoid the renumbering of sections 102.14 to 102.72 the Board has left this section number blank.

SEC. 102.14 *Service of charge.*—Upon the filing of a charge, the charging party shall be responsible for the timely and proper service of a copy thereof upon the person against whom such charge is made. The regional director will, as a matter of course, cause a copy of such charge to be served upon the person against whom the charge is made, but he shall not be deemed to assume responsibility for such service.

COMPLAINT

SEC. 102.15 *When and by whom issued; contents; service.*—After a charge has been filed, if it appears to the regional director that formal proceedings in respect thereto should be instituted, he shall issue and cause to be served upon all the other parties a formal complaint in the name of the Board stating the unfair labor practices and containing a notice of hearing before a trial examiner at a place therein fixed and at a time not less than 10 days after the service of the complaint.

SEC. 102.16 *Hearing; extension.*—Upon his own motion or upon proper cause shown by any other party, the regional director issuing the complaint may extend the date of such hearing.

SEC. 102.17 *Amendment.*—Any such complaint may be amended upon such terms as may be deemed just, prior to the hearing, by the regional director issuing the complaint; at the hearing and until the case has been transferred to the Board pursuant to section 102.45, upon motion, by the trial examiner designated to conduct the hearing; and after the case has been transferred to the Board pursuant

² A blank form for making a charge will be supplied by the regional director upon request.

to section 102.45, at any time prior to the issuance of an order based thereon, upon motion, by the Board.

SEC. 102.18 *Withdrawal.*—Any such complaint may be withdrawn before the hearing by the regional director on his own motion.

SEC. 102.19 *Review by the general counsel of refusal to issue.*—If, after the charge has been filed, the regional director declines to issue a complaint, he shall so advise the parties in writing, accompanied by a simple statement of the procedural or other grounds. The person making the charge may obtain a review of such action by filing a request therefor with the general counsel in Washington, D.C., and filing a copy of the request with the regional director, within 10 days from the service of the notice of such refusal by the regional director. The request shall contain a complete statement setting forth the facts and reasons upon which the request is based.

ANSWER

SEC. 102.20 *Answer to complaint; time for filing; contents; allegations not denied deemed admitted.*—The respondent shall, within 10 days from the service of the complaint, file an answer thereto. The respondent shall specifically admit, deny, or explain each of the facts alleged in the complaint, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial. All allegations in the complaint, if no answer is filed, or any allegation in the complaint not specifically denied or explained in an answer filed, unless the respondent shall state in the answer that he is without knowledge, shall be deemed to be admitted to be true and shall be so found by the Board, unless good cause to the contrary is shown.

SEC. 102.21 *Where to file; service upon the parties; form.*—An original and four copies of the answer shall be filed with the regional director issuing the complaint. Immediately upon the filing of his answer, respondent shall serve a copy thereof on each of the other parties. An answer of a party represented by counsel shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his answer and state his address. Except when otherwise specifically provided by rule or statute, an answer need not be verified or accompanied by affidavit. The signature of an attorney constitutes a certificate by him that he has read the answer; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If an answer is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the

answer had not been served. For a willful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted.

SEC. 102.22 *Extension of time for filing.*—Upon his own motion or upon proper cause shown by any other party the regional director issuing the complaint may by written order extend the time within which the answer shall be filed.

SEC. 102.23 *Amendment.*—The respondent may amend his answer at any time prior to the hearing. During the hearing or subsequent thereto, he may amend his answer in any case where the complaint has been amended, within such period as may be fixed by the trial examiner or the Board. Whether or not the complaint has been amended, the answer may, in the discretion of the trial examiner or the Board, upon motion, be amended upon such terms and within such periods as may be fixed by the trial examiner or the Board.

MOTIONS

SEC. 102.24 *Motions; where to file prior to hearing and during hearing; contents; service on other parties.*—All motions made prior to the hearing shall be filed in writing with the regional director issuing the complaint, and shall briefly state the order or relief applied for and the grounds for such motion. The moving party shall file an original and four copies of all such motions and immediately serve a copy thereof upon each of the other parties. All motions made at the hearing shall be made in writing to the trial examiner or stated orally on the record.

SEC. 102.25 *Ruling on motions; where to file motions after hearing and before transfer of case to Board.*—The trial examiner designated to conduct the hearing shall rule upon all motions (except as provided in sections 102.16, 102.22, 102.29, and 102.47). The trial examiner may, before the hearing, rule on motions filed prior to the hearing, and shall cause copies of his ruling to be served upon all the parties. All motions filed subsequent to the hearing, but before the transfer of the case to the Board pursuant to section 102.45, shall be filed with the trial examiner, care of the chief trial examiner in Washington, D.C., or associate chief trial examiner, San Francisco, California, as the case may be, and a copy thereof shall be served on each of the parties. Rulings by the trial examiner on motions, and any orders in connection therewith, if announced at the hearing, shall be stated orally on the record; in all other cases such rulings and orders shall be issued in writing. The trial examiner shall cause a copy of the same to be served upon each of the other parties, or shall make his ruling in the intermediate report. Whenever the trial examiner has

reserved his ruling on any motion, and the proceeding is thereafter transferred to and continued before the Board pursuant to section 102.50, the Board shall rule on such motion.

SEC. 102.26 *Motions; rulings and orders part of the record; rulings not to be appealed directly to Board without special permission; requests for special permission to appeal.*—All motions, rulings, and orders shall become part of the record, except that rulings on motions to revoke subpoenas shall become a part of the record only upon the request of the party aggrieved thereby, as provided in section 102.31. Unless expressly authorized by the Rules and Regulations, rulings by the regional director and by the trial examiner on motions, by the trial examiner on objections, and orders in connection therewith, shall not be appealed directly to the Board except by special permission of the Board, but shall be considered by the Board in reviewing the record, if exception to the ruling or order is included in the statement of exceptions filed with the Board, pursuant to section 102.46. Requests to the Board for special permission to appeal from such rulings of the regional director or the trial examiner shall be filed promptly, in writing, and shall briefly state the grounds relied on. The moving party shall immediately serve a copy thereof on each other party.

SEC. 102.27 *Review of granting of motion to dismiss entire complaint; reopening of record.*—If any motion in the nature of a motion to dismiss the complaint in its entirety is granted by the trial examiner before filing his intermediate report, any party may obtain a review of such action by filing a request therefor with the Board in Washington, D.C., stating the grounds for review and immediately on such filing shall serve a copy thereof on the regional director and the other parties. Unless such request for review is filed within 10 days from the date of the order of dismissal, the case shall be closed.

SEC. 102.28 *Filing of answer or other participation in proceedings not a waiver of rights.*—The right to make motions or to make objections to rulings upon motions shall not be deemed waived by the filing of an answer or by other participation in the proceedings before the trial examiner or the Board.

INTERVENTION

SEC. 102.29 *Intervention; requisites; rulings on motions to intervene.*—Any person desiring to intervene in any proceeding shall file a motion in writing or, if made at the hearing, may move orally on the record, stating the grounds upon which such person claims an interest. Prior to the hearing, such a motion shall be filed with the regional director issuing the complaint; during the hearing such motion shall be made to the trial examiner. An original and four

copies of written motions shall be filed. Immediately upon filing such motion, the moving party shall serve a copy thereof upon each of the other parties. The regional director shall rule upon all such motions filed prior to the hearing, and shall cause a copy of said rulings to be served upon each of the other parties, or may refer the motion to the trial examiner for ruling. The trial examiner shall rule upon all such motions made at the hearing or referred to him by the regional director, in the manner set forth in section 102.25. The regional director or the trial examiner, as the case may be, may by order permit intervention in person or by counsel or other representative to such extent and upon such terms as he may deem proper.

WITNESSES, DEPOSITIONS, AND SUBPENAS

SEC. 102.30 *Examination of witnesses; depositions.*—Witnesses shall be examined orally under oath, except that for good cause shown after the issuance of a complaint, testimony may be taken by deposition.

(a) Applications to take depositions shall be in writing setting forth the reasons why such depositions should be taken, the name and post office address of the witness, the matters concerning which it is expected the witness will testify, and the time and place proposed for the taking of the deposition, together with the name and address of the person before whom it is desired that the deposition be taken (for the purposes of this section hereinafter referred to as the "officer"). Such application shall be made to the regional director prior to the hearing, and to the trial examiner during and subsequent to the hearing but before transfer of the case to the Board pursuant to section 102.45 or section 102.50. Such application shall be served upon the regional director or the trial examiner, as the case may be, and upon all other parties, not less than 7 days (when the deposition is to be taken within the continental United States) and 15 days (if the deposition is to be taken elsewhere) prior to the time when it is desired that the deposition be taken. The regional director or trial examiner, as the case may be, shall upon receipt of the application, if in his discretion good cause has been shown, make and serve upon the parties an order which will specify the name of the witness whose deposition is to be taken and the time, the place, and the designation of the officer before whom the witness is to testify, who may or may not be the same officer as that specified in the application. Such order shall be served upon all the other parties by the regional director or upon all parties by the trial examiner.

(b) Such deposition may be taken before any officer authorized to administer oaths by the laws of the United States or of the place where

the examination is held, including any agent of the Board authorized to administer oaths. If the examination is held in a foreign country, it may be taken before any secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States.

(c) At the time and place specified in said order the officer designated to take such deposition shall permit the witness to be examined and cross-examined under oath by all the parties appearing, and his testimony shall be reduced to typewriting by the officer or under his direction. All objections to questions or evidence shall be deemed waived unless made at the examination. The officer shall not have power to rule upon any objections but he shall note them upon the deposition. The testimony shall be subscribed by the witness in the presence of the officer who shall attach his certificate stating that the witness was duly sworn by him, that the deposition is a true record of the testimony and exhibits given by the witness, and that said officer is not of counsel or attorney to any of the parties nor interested in the event of the proceeding or investigation. If the deposition is not signed by the witness because he is ill, dead, cannot be found, or refuses to sign it, such fact shall be included in the certificate of the officer and the deposition may then be used as fully as though signed. The officer shall immediately deliver an original and two copies of said transcript, together with his certificate, in person or by registered mail to the regional director or the trial examiner, care of the chief trial examiner in Washington, D.C., or associate chief trial examiner, San Francisco, California, as the case may be.

(d) The trial examiner shall rule upon the admissibility of the deposition or any part thereof.

(e) All errors or irregularities in compliance with the provisions of this section shall be deemed waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is or, with due diligence, might have been ascertained.

(f) If the parties so stipulate in writing, depositions may be taken before any person at any time or place, upon any notice and in any manner, and when so taken may be used like other depositions.

SEC. 102.31 *Issuance of subpoenas; petitions to revoke subpoenas; right to inspect or copy data.*—(a) Any member of the Board shall, on the written application of any party, forthwith issue subpoenas requiring the attendance and testimony of witnesses and the production of any evidence, including books, records, correspondence, or documents, in their possession or under their control. Applications for subpoenas, if filed prior to the hearing, shall be filed with the regional director. Applications for subpoenas filed during the hearing

shall be filed with the trial examiner. Either the regional director or the trial examiner, as the case may be, shall grant the application, on behalf of any member of the Board. Applications for subpoenas may be made *ex parte*. The subpoena shall show on its face the name and address of the party at whose request the subpoena was issued.

(b) Any person, served with a subpoena, whether *ad testificandum* or *duces tecum*, if he does not intend to comply with the subpoena, shall, within 5 days after the date of service of the subpoena upon him, petition in writing to revoke the subpoena. All petitions to revoke subpoenas shall be served upon the party at whose request the subpoena was issued. Such petition to revoke, if made prior to the hearing, shall be filed with the regional director and the regional director shall refer the petition to the trial examiner or the Board for ruling. Petitions to revoke subpoenas filed during the hearing shall be filed with the trial examiner. Notice of the filing of petitions to revoke shall be promptly given by the regional director or the trial examiner, as the case may be, to the party at whose request the subpoena was issued. The trial examiner or the Board, as the case may be, shall revoke the subpoena if in its opinion the evidence whose production is required does not relate to any matter under investigation or in question in the proceedings or the subpoena does not describe with sufficient particularity the evidence whose production is required, or if for any other reason sufficient in law the subpoena is otherwise invalid. The trial examiner or the Board, as the case may be, shall make a simple statement of procedural or other grounds for the ruling on the petition to revoke. The petition to revoke, any answer filed thereto, and any ruling thereon shall not become part of the official record except upon the request of the party aggrieved by the ruling.

(c) Persons compelled to submit data or evidence at a public proceeding are entitled to retain or, on payment of lawfully prescribed costs, to procure copies or transcripts of the data or evidence submitted by them. Persons compelled to submit data or evidence in the nonpublic investigative stages of proceedings may, for good cause, be limited by the regional director to inspection of the official transcript of their testimony, but shall be entitled to make copies of documentary evidence or exhibits which they have produced.

(d) Upon the failure of any person to comply with a subpoena issued upon the request of a private party, the general counsel shall, in the name of the Board but on relation of such private party, institute proceedings in the appropriate district court for the enforcement thereof, unless in the judgment of the Board the enforcement of such subpoena would be inconsistent with law and with the policies of the act. Neither the general counsel nor the Board shall be deemed

thereby to have assumed responsibility for the effective prosecution of the same before the court.

SEC. 102.32 *Payment of witness fees and mileage; fees of persons taking depositions.*—Witnesses summoned before the trial examiner shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States. Witness fees and mileage shall be paid by the party at whose instance the witnesses appear and the person taking the deposition shall be paid by the party at whose instance the deposition is taken.

TRANSFER, CONSOLIDATION, AND SEVERANCE

SEC. 102.33 *Transfer of charge and proceeding from region to region; consolidation of proceedings in same region; severance.*—Whenever the general counsel deems it necessary in order to effectuate the purposes of the act or to avoid unnecessary costs or delay, he may permit a charge to be filed with him in Washington, D.C., or may, at any time after a charge has been filed with a regional director pursuant to section 102.10, order that such charge and any proceeding which may have been initiated with respect thereto:

(a) Be transferred to and continued before him for the purpose of investigation or consolidation with any other proceeding which may have been instituted in a regional office or with him; or

(b) Be consolidated with any other proceeding which may have been instituted in the same region; or

(c) Be transferred to and continued in any other region for the purpose of investigation or consolidation with any proceeding which may have been instituted in or transferred to such other region.

The provisions of sections 102.9 to 102.32, inclusive, shall, insofar as applicable, govern proceedings before the general counsel pursuant to this section, and the powers granted to regional directors in such provisions shall, for the purpose of this section, be reserved to and exercised by the general counsel. After the transfer of any charge and any proceeding which may have been instituted with respect thereto from one region to another pursuant to this section, the provisions of this subpart shall, insofar as applicable, govern such charge and such proceeding as if the charge had originally been filed in the region to which the transfer is made.

Motions to sever proceedings may be filed before hearing, with the regional director, and during the hearing, with the trial examiner. The regional director shall refer all such motions filed with him to the trial

examiner for ruling. Rulings by the trial examiner on motions to sever may be appealed to the Board in accordance with section 102.26.

HEARINGS

SEC. 102.34 *Who shall conduct; to be public unless otherwise ordered.*—The hearing for the purpose of taking evidence upon a complaint shall be conducted by a trial examiner designated by the chief trial examiner in Washington, D.C., or the associate chief trial examiner, San Francisco, California, as the case may be, unless the Board or any member thereof presides. At any time a trial examiner may be designated to take the place of the trial examiner previously designated to conduct the hearing. Such hearings shall be public unless otherwise ordered by the Board or the trial examiner.

SEC. 102.35 *Duties and powers of trial examiners.*—It shall be the duty of the trial examiner to inquire fully into the facts as to whether the respondent has engaged in or is engaging in an unfair labor practice affecting commerce as set forth in the complaint or amended complaint. The trial examiner shall have authority, with respect to cases assigned to him, between the time he is designated and transfer of the case to the Board, subject to the Rules and Regulations of the Board and within its powers:

- (a) To administer oaths and affirmations;
- (b) To grant applications for subpoenas;
- (c) To rule upon petitions to revoke subpoenas;
- (d) To rule upon offers of proof and receive relevant evidence;
- (e) To take or cause depositions to be taken whenever the ends of justice would be served thereby;
- (f) To regulate the course of the hearing and, if appropriate or necessary, to exclude persons or counsel from the hearing for contemptuous conduct and to strike all related testimony of witnesses refusing to answer any proper question;
- (g) To hold conferences for the settlement or simplification of the issues by consent of the parties, but not to adjust cases;
- (h) To dispose of procedural requests or similar matters, including motions referred to the trial examiner by the regional director and motions to amend pleadings; also to dismiss complaints or portions thereof, and to order hearings reopened prior to issuance of intermediate reports (recommended decisions);
- (i) To make and file intermediate reports in conformity with section 8 of the Administrative Procedure Act;
- (j) To call, examine, and cross-examine witnesses and to introduce into the record documentary or other evidence;

(k) To take any other action necessary under the foregoing and authorized by the published Rules and Regulations of the Board.

SEC. 102.36 *Unavailability of trial examiners.*—In the event the trial examiner designated to conduct the hearing becomes unavailable to the Board after the hearing has been concluded and before the filing of his intermediate report, the Board may transfer the case to itself for purposes of further hearing or issuance of an intermediate report or both on the record as made, or may request the chief trial examiner in Washington, D.C., or associate chief trial examiner, San Francisco, California, as the case may be, to designate another trial examiner for such purposes.

SEC. 102.37 *Disqualification of trial examiners.*—A trial examiner may withdraw from a proceeding whenever he deems himself disqualified. Any party may request the trial examiner, at any time following his designation by the chief trial examiner or associate chief trial examiner and before filing of his intermediate report, to withdraw on ground of personal bias or disqualification, by filing with him promptly upon the discovery of the alleged facts a timely affidavit setting forth in detail the matters alleged to constitute grounds for disqualification. If, in the opinion of the trial examiner, such affidavit is filed with due diligence and is sufficient on its face, he shall forthwith disqualify himself and withdraw from the proceeding. If the trial examiner does not disqualify himself and withdraw from the proceeding, he shall so rule upon the record, stating the grounds for his ruling and proceed with the hearing, or if the hearing has closed, he shall proceed with issuance of his intermediate report, and the provisions of section 102.26, with respect to review of rulings of trial examiners, shall thereupon apply.

SEC. 102.38 *Rights of parties.*—Any party shall have the right to appear at such hearing in person, by counsel, or by other representative, to call, examine, and cross-examine witnesses, and to introduce into the record documentary or other evidence, except that the participation of any party shall be limited to the extent permitted by the trial examiner: *And provided further,* That documentary evidence shall be submitted in duplicate.

SEC. 102.39 *Rules of evidence controlling so far as practicable.*—Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the act of June 19, 1934 (U.S.C., title 28, secs. 723-B, 723-C).

SEC. 102.40 *Stipulations of fact admissible.*—In any such proceeding stipulations of fact may be introduced in evidence with respect to any issue.

SEC. 102.41 *Objection to conduct of hearing; how made; objections not waived by further participation.*—Any objection with respect to the conduct of the hearing, including any objection to the introduction of evidence, may be stated orally or in writing, accompanied by a short statement of the grounds of such objection, and included in the record. No such objection shall be deemed waived by further participation in the hearing.

SEC. 102.42 *Filing of briefs and proposed findings with the trial examiner and oral argument at the hearing.*—Any party shall be entitled, upon request, to a reasonable period at the close of the hearing for oral argument, which shall be included in the stenographic report of the hearing. Any party shall be entitled, upon request made before the close of the hearing, to file a brief or proposed findings and conclusions, or both, with the trial examiner who may fix a reasonable time for such filing, but not in excess of 35 days from the close of the hearing. Requests for further extensions of time shall be made to the chief trial examiner in Washington, D.C., or associate chief trial examiner, San Francisco, California, as the case may be. No request will be considered unless received at least 8 days prior to the expiration of the time fixed for the filing of briefs or proposed findings and conclusions. Notice of the request for any extension shall be immediately served upon all other parties, and proof of service shall be furnished. Three copies of the brief or proposed findings and conclusions shall be filed with the trial examiner, and copies shall be served upon each of the other parties, and a statement of such service shall be furnished.

SEC. 102.43 *Continuance and adjournment.*—In the discretion of the trial examiner, the hearing may be continued from day to day, or adjourned to a later date or to a different place, by announcement thereof at the hearing by the trial examiner, or by other appropriate notice.

SEC. 102.44 *Misconduct at hearing before a trial examiner or the Board; refusal of witness to answer questions.*—(a) Misconduct at any hearing before a trial examiner or before the Board shall be ground for summary exclusion from the hearing.

(b) Such misconduct of an aggravated character, when engaged in by an attorney or other representative of a party, shall be ground for suspension or disbarment by the Board from further practice before it after due notice and hearing.

(c) The refusal of a witness at any such hearing to answer any question which has been ruled to be proper shall, in the discretion of the trial examiner, be ground for striking all testimony previously given by such witness on related matters.

INTERMEDIATE REPORT AND TRANSFER OF CASE TO THE BOARD

SEC. 102.45 *Intermediate report and recommended order; contents; service; transfer of the case to the Board; contents of record in case.*—

(a) After hearing for the purpose of taking evidence upon a complaint, the trial examiner shall prepare an intermediate report and recommended order, but the initial decision shall be made by the Board. Such report shall contain findings of fact, conclusions, and the reasons or basis therefor, upon all material issues of fact, law, or discretion presented on the record, and the recommended orders shall contain recommendations as to what disposition of the case should be made, which may include, if it be found that the respondent has engaged in or is engaging in the alleged unfair labor practices, a recommendation for such affirmative action by the respondent as will effectuate the policies of the act. The trial examiner shall file the original of the intermediate report and recommended order with the Board and cause a copy thereof to be served upon each of the parties. Upon the filing of the report and recommended order, the Board shall enter an order transferring the case to the Board and shall serve copies of the order, setting forth the date of such transfer, upon all the parties. Service of the intermediate report and of the order transferring the case to the Board shall be complete upon mailing.

(b) The charge upon which the complaint was issued and any amendments thereto, the complaint and any amendments thereto, notice of hearing, answer and any amendments thereto, motions, rulings, orders, the stenographic report of the hearing, stipulations, exhibits, documentary evidence, and depositions, together with the intermediate report and recommended order and exceptions, shall constitute the record in the case.

EXCEPTIONS TO THE RECORD AND PROCEEDINGS

SEC. 102.46 *Exceptions or supporting briefs; time for filing; where to file; service on parties; extension of time; effect of failure to include matter in exceptions; oral arguments.*—

(a) Within 20 days, or within such further period as the Board may allow, from the date of the service of the order transferring the case to the Board, pursuant to section 102.45, any party may (in accordance with section 10(c) of the act and section 102.113 and section 102.114 of these rules) file with the Board in Washington, D.C., seven copies of a statement in writing set-

ting forth exceptions to the intermediate report and recommended order or to any other part of the record or proceedings (including rulings upon all motions or objections), together with seven copies of a brief in support of said exceptions and immediately upon such filing copies shall be served on each of the other parties; and any party may, within the same period, file seven copies of a brief in support of the intermediate report and recommended order. Copies of such exceptions and briefs shall immediately be served on each of the other parties. Statements of exceptions and briefs shall designate by precise citation of *page and line* the portions of the record relied upon. Upon special leave of the Board, any party may file a reply brief upon such terms as the Board may impose. Requests for such leave or for extension of the time in which to file exceptions or briefs under authority of this section shall be in writing and copies thereof shall be immediately served on each of the other parties. Requests for an extension must be received by the Board 3 days prior to the due date.

(b) No matter not included in a statement of exceptions may thereafter be urged before the Board, or in any further proceeding.

(c) Should any party desire permission to argue orally before the Board, request therefor must be made in writing to the Board simultaneously with the statement of any exceptions filed pursuant to the provisions of paragraph (a) of this section with a statement of service on all other parties furnished with such request. The Board shall notify the parties of the time and place of oral argument, if such permission is granted.

(d) Oral arguments are limited to 30 minutes for each party entitled to participate. No request for additional time will be granted unless timely application is made in advance of oral argument.

(e) Exceptions to intermediate reports and recommended orders, or to the record, briefs in support of exceptions, and briefs in support of intermediate reports and recommended orders shall be printed or otherwise legibly duplicated: *Provided, however,* That carbon copies of typewritten matter shall not be filed and if submitted will not be accepted.

SEC. 102.47 *Filing of motion after transfer of case to Board.*—All motions filed after the case has been transferred to the Board pursuant to section 102.45 shall be filed with the Board in Washington, D.C., by transmitting seven copies thereof, together with an affidavit of service, upon each of the parties. Such motions shall be printed or otherwise legibly duplicated: *Provided, however,* That carbon copies of typewritten matter shall not be filed and if submitted will not be accepted.

PROCEDURE BEFORE THE BOARD

SEC. 102.48 *Action of Board upon expiration of time to file exceptions to intermediate report.*—(a) In the event no statement of exceptions is filed as herein provided, the findings, conclusions, and recommendations of the trial examiner as contained in his intermediate report and recommended order shall be adopted by the Board and become its findings, conclusions, and order, and all objections and exceptions thereto shall be deemed waived for all purposes. However, the Board may, in its discretion, order such case closed upon compliance.

(b) Upon the filing of a statement of exceptions and briefs, as provided in section 102.46, the Board may decide the matter forthwith upon the record, or after oral argument, or may reopen the record and receive further evidence before a member of the Board or other Board agent or agency, or may close the case upon compliance with recommendations of the intermediate report, or may make other disposition of the case.

SEC. 102.49 *Modification or setting aside of order of Board before record filed in court; action thereafter.*—Within the limitations of the provisions of section 10(c) of the act, and section 102.48 of these rules, until a transcript of the record in a case shall have been filed in a court, within the meaning of section 10 of the act, the Board may at any time upon reasonable notice modify or set aside, in whole or in part, any findings of fact, conclusions of law, or order made or issued by it. Thereafter, the Board may proceed pursuant to section 102.50, insofar as applicable.

SEC. 102.50 *Hearings before Board or member thereof.*—Whenever the Board deems it necessary in order to effectuate the purpose of the act or to avoid unnecessary costs or delay, it may, at any time after a complaint has issued pursuant to section 102.15 or section 102.33, order that such complaint and any proceeding which may have been instituted with respect thereto be transferred to and continued before it or any member of the Board. The provisions of this subpart shall, insofar as applicable, govern proceedings before the Board or any member pursuant to this section, and the powers granted to trial examiners in such provisions shall, for the purpose of this section, be reserved to and exercised by the Board or the member thereof who shall preside.

SEC. 102.51 *Settlement or adjustment of issues.*—At any stage of a proceeding prior to hearing, where time, the nature of the proceeding, and the public interest permit, all interested parties shall have opportunity to submit to the regional director, with whom the charge was

filed, for consideration facts, arguments, offers of settlement, or proposals of adjustment.

Backpay Proceedings

SEC. 102.52 *Initiation of proceedings; issuance of backpay specification; issuance of notice of hearing without backpay specification.*—After the entry of a Board order directing the payment of backpay or the entry of a court decree enforcing such a Board order, if it appears to the regional director that a controversy exists between the Board and a respondent concerning the amount of backpay due which cannot be resolved without a formal proceeding, the regional director may issue and serve upon all parties a backpay specification in the name of the Board. The specification shall contain or be accompanied by a notice of hearing before a trial examiner at a place therein fixed and at a time not less than 15 days after the service of the specification. In the alternative and at his discretion, the regional director may, under the circumstances specified above, issue and serve upon the parties a notice of hearing only, without the backpay specification, the hearing to be held before a trial examiner, at a place therein fixed and at a time not less than 15 days after the service of the notice of hearing.

SEC. 102.53 *Contents of backpay specification and of notice of hearing without specification.*

(a) *Contents of backpay specification.*—Where the specification procedure is used, the specification shall specifically and in detail show, for each employee, the backpay periods broken down by calendar quarters, the specific figures and basis of computation as to gross backpay and interim earnings, the expenses for each quarter, the net backpay due, and any other pertinent information.

(b) *Contents of notice of hearing without specification.*—The notice of hearing without specification shall contain, in addition to the time and place of hearing before a trial examiner, a brief statement of the matters in controversy.

SEC. 102.54 *Answer to specification; no requirement for answer to notice of hearing issued without backpay specification.*

(a) *Filing and service of answer to specification.*—The respondent shall, within 15 days from the service of the specification, if any, file an answer thereto; an original and four copies shall be filed with the regional director issuing the specification, and a copy thereof shall immediately be served on any other respondent jointly liable.

(b) *Contents of the answer to specification.*—The answer to the specification shall be in writing, the original being signed and sworn to by the respondent or by a duly authorized agent with appropriate

power of attorney affixed, and shall contain the post office address of the respondent. The respondent shall specifically admit, deny, or explain each and every allegation of the specification, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial. Denials shall fairly meet the substance of the allegations of the specification denied. When a respondent intends to deny only a part of an allegation, the respondent shall specify so much of it as is true and shall deny only the remainder. As to all matters within the knowledge of the respondent, including but not limited to the various factors entering into the computation of gross backpay, a general denial shall not suffice. As to such matters, if the respondent disputes either the accuracy of the figures in the specification or the premises on which they are based, he shall specifically state the basis for his disagreement, setting forth in detail his position as to the applicable premises and furnishing the appropriate supporting figures.

(c) *Effect of failure to answer or to plead specifically and in detail to the specification.*—If the respondent fails to file any answer to the specification within the time prescribed by this section, the Board may, either with or without taking evidence in support of the allegations of the specification and without notice to the respondent, find the specification to be true and enter such order as may be appropriate. If the respondent files an answer to the specification but fails to deny any allegation of the specification in the manner required by paragraph (b) of this section, and the failure so to deny is not adequately explained, such allegation shall be deemed to be admitted to be true, and may be so found by the Board without the taking of evidence supporting such allegation, and the respondent shall be precluded from introducing any evidence controverting said allegation.

(d) *Answer to the notice of hearing issued without backpay specification.*—No answer need be filed by respondent to notice of hearing issued without a specification.

SEC. 102.55 *Extension of time for filing answer to specification.*—Upon his own motion or upon proper cause shown by any respondent, the regional director issuing the specification may by written order extend the time within which the answer to the specification shall be filed.

SEC. 102.56 *Extension of date of hearing.*—Upon his own motion or upon proper cause shown, the regional director issuing the specification or notice of hearing without specification may extend the date of hearing.

SEC. 102.57 *Amendment to backpay specification.*—After the issuance of the notice of hearing, but prior to the opening thereof, the

regional director may amend the backpay specification and the respondent affected thereby may amend his answer thereto. After the opening of the hearing, the specification and the answer thereto may be amended upon leave of the trial examiner or of the Board, as the case may be, good cause therefor appearing.

SEC. 102.58 *Withdrawal.*—Any such specification or notice of hearing without specification may be withdrawn before the hearing by the regional director on his own motion.

SEC. 102.59 *Hearing; posthearing procedure.*—After the issuance of a notice of hearing with or without backpay specification, the procedures provided in sections 102.24 to 102.51, inclusive, shall be followed insofar as applicable.

Subpart C—Procedure Under Section 9(c) of the Act for the Determination of Questions Concerning Representation of Employees*

SEC. 102.60 *Petition for certification or decertification; who may file; where to file; withdrawal.*—A petition for investigation of a question concerning representation of employees under paragraphs (1)(A)(i) and (1)(B) of section 9(c) of the act (hereinafter called a petition for certification) may be filed by an employee or group of employees or any individual or labor organization acting in their behalf or by an employer. A petition under paragraph (1)(A)(ii) of section 9(c) of the act, alleging that the individual or labor organization which has been certified or is being currently recognized as the bargaining representative is no longer such representative (hereinafter called a petition for decertification), may be filed by any employee or group of employees or any individual or labor organization acting in their behalf. Petitions under this section shall be in writing and signed,* and either shall be sworn to before a notary public, Board agent, or other person duly authorized by law to administer oaths and take acknowledgments or shall contain a declaration by the person signing it, under the penalties of the Criminal Code, that its contents are true and correct to the best of his knowledge and belief. Four copies of the petition shall be filed. Except as provided in section 102.72, such petitions shall be filed with the regional director for the region wherein the bargaining unit exists, or, if the bargaining unit exists in two or more regions, with the regional director for any of such regions. Prior to the transfer of the case to the Board, pursuant to section 102.67, the petition may be withdrawn only with

* Procedure under the first proviso to sec. 8(b)(7)(C) of the act is governed by subpart D.

* Blank forms for filing such petitions will be supplied by the regional office upon request.

the consent of the regional director with whom such petition was filed. After the transfer of the case to the Board, the petition may be withdrawn only with the consent of the Board. Whenever the regional director or the Board, as the case may be, approves the withdrawal of any petition, the case shall be closed.

SEC. 102.61 *Contents of petition for certification; contents of petition for decertification.*—(a) A petition for certification, when filed by an employee or group of employees or an individual or labor organization acting in their behalf, shall contain the following:

- (1) The name of the employer.
- (2) The address of the establishments involved.
- (3) The general nature of the employer's business.
- (4) A description of the bargaining unit which the petitioner claims to be appropriate.
- (5) The names and addresses of any other persons or labor organizations who claim to represent any employees in the alleged appropriate unit, and brief descriptions of the contracts, if any, covering the employees in such unit.
- (6) The number of employees in the alleged appropriate unit.
- (7) A statement that the employer declines to recognize the petitioner as the representative within the meaning of section 9 (a) of the act or that the labor organization is currently recognized but desires certification under the act.
- (8) The name, affiliation, if any, and address of the petitioner.
- (9) Whether a strike or picketing is in progress at the establishment involved and, if so, the approximate number of employees participating, and the date such strike or picketing commenced.
- (10) Any other relevant facts.

(b) A petition for certification, when filed by an employer, shall contain the following:

- (1) The name and address of the petitioner.
- (2) The general nature of the petitioner's business.
- (3) A brief statement setting forth that one or more individuals or labor organizations have presented to the petitioner a claim to be recognized as the exclusive representative of all employees in the unit claimed to be appropriate; a description of such unit; and the number of employees in the unit.
- (4) The name or names, affiliation, if any, and addresses of the individuals or labor organizations making such claim for recognition.
- (5) A statement whether the petitioner has contracts with any labor organization or other representatives of employees and, if so, their expiration date.

(6) Whether a strike or picketing is in progress at the establishment involved and, if so, the approximate number of employees participating, and the date such strike or picketing commenced.

(7) Any other relevant facts.

(c) Petitions for decertification shall contain the following:

(1) The name of the employer.

(2) The address of the establishments and a description of the bargaining unit involved.

(3) The general nature of the employer's business.

(4) Name and address of the petitioner and affiliation, if any.

(5) Name or names of the individuals or labor organizations who have been certified or are being currently recognized by the employer and who claim to represent any employees in the unit involved, and the expiration date of any contracts covering such employees.

(6) An allegation that the individuals or labor organizations who have been certified or are currently recognized by the employer are no longer the representative in the appropriate unit as defined in section 9(a) of the act.

(7) The number of employees in the unit.

(8) Whether a strike or picketing is in progress at the establishment involved and, if so, the approximate number of employees participating, and the date such strike or picketing commenced.

(9) Any other relevant facts.

SEC. 102.62 *Consent-election agreements.*—(a) Where a petition has been duly filed, the employer and any individuals or labor organizations representing a substantial number of employees involved may, with the approval of the regional director, enter into a consent-election agreement leading to a determination by the regional director of the facts ascertained after such consent election. Such agreement shall include a description of the appropriate unit, the time and place of holding the election, and the payroll period to be used in determining what employees within the appropriate unit shall be eligible to vote. Such consent election shall be conducted under the direction and supervision of the regional director. The method of conducting such consent election shall be consistent with the method followed by the regional director in conducting elections pursuant to sections 102.69 and 102.70 except that the rulings and determinations by the regional director of the results thereof shall be final, and the regional director shall issue to the parties a certification of the results of the election, including certification of representatives where appropriate, with the same force and effect as if issued by the Board, provided further that

rulings or determinations by the regional director in respect to any amendment of such certification shall also be final.

(b) Where a petition has been duly filed, the employer and any individuals or labor organizations representing a substantial number of the employees involved may, with the approval of the regional director, enter into an agreement providing for a waiver of hearing and a consent election leading to a determination by the Board of the facts ascertained after such consent election, if such a determination is necessary. Such agreement shall also include a description of the appropriate bargaining unit, the time and place of holding the election, and the payroll period to be used in determining which employees within the appropriate unit shall be eligible to vote. Such consent election shall be conducted under the direction and supervision of the regional director. The method of conducting such election and the postelection procedure shall be consistent with that followed by the regional director in conducting elections pursuant to sections 102.69 and 102.70.

SEC. 102.63 *Investigation of petition by regional director; notice of hearing; service of notice; withdrawal of notice.*—After a petition has been filed, if no agreement such as that provided in section 102.62 is entered into and if it appears to the regional director that there is reasonable cause to believe that a question of representation affecting commerce exists, that the policies of the act will be effectuated, and that an election will reflect the free choice of employees in the appropriate unit, he shall prepare and cause to be served upon the parties and upon any known individuals or labor organizations purporting to act as representatives of any employees directly affected by such investigation, a notice of hearing before a hearing officer at a time and place fixed therein. A copy of the petition shall be served with such notice of hearing. Any such notice of hearing may be amended or withdrawn before the close of the hearing by the regional director on his own motion.

SEC. 102.64 *Conduct of hearing.*—(a) Hearings shall be conducted by a hearing officer and shall be open to the public unless otherwise ordered by the hearing officer. At any time, a hearing officer may be substituted for the hearing officer previously presiding. It shall be the duty of the hearing officer to inquire fully into all matters in issue and necessary to obtain a full and complete record upon which the Board or the regional director may discharge their duties under section 9(c) of the act.

(b) The hearing officer may, in his discretion, continue the hearing from day to day, or adjourn it to a later date or to a different place, by announcement thereof at the hearing or by other appropriate notice.

SEC. 102.65 *Motions; interventions.*—(a) All motions, including motions for intervention pursuant to paragraph (b) of this section, shall be in writing or, if made at the hearing, may be stated orally on the record and shall briefly state the order or relief sought and the grounds for such motion. An original and four copies of written motions shall be filed and a copy thereof immediately shall be served upon each of the other parties to the proceeding. Motions made prior to the transfer of the case to the Board shall be filed with the regional director, except that motions made during the hearing shall be filed with the hearing officer. After the transfer of the case to the Board, all motions shall be filed with the Board. Such motions shall be printed or otherwise legibly duplicated: *Provided, however,* That carbon copies of typewritten matter shall not be filed and if submitted will not be accepted. Seven copies of such motions shall be filed with the Board. The regional director may rule upon all motions filed with him, causing a copy of said ruling to be served upon each of the parties, or he may refer the motion to the hearing officer: *Provided,* That if the regional director prior to the close of the hearing grants a motion to dismiss the petition, the petitioner may obtain a review of such ruling in the manner prescribed in section 102.71. The hearing officer shall rule, either orally on the record or in writing, upon all motions filed at the hearing or referred to him as hereinabove provided, except that all motions to dismiss petitions shall be referred for appropriate action at such time as the entire record is considered by the regional director or the Board, as the case may be.

(b) Any person desiring to intervene in any proceeding shall make a motion for intervention, stating the grounds upon which such person claims to have an interest in the proceeding. The regional director or the hearing officer, as the case may be, may by order permit intervention in person or by counsel or other representative to such extent and upon such terms as he may deem proper, and such intervenor shall thereupon become a party to the proceeding.

(c) All motions, rulings, and orders shall become a part of the record, except that rulings on motions to revoke subpoenas shall become a part of the record only upon the request of the party aggrieved, as provided in section 102.66(c). Unless expressly authorized by the Rules and Regulations, rulings by the regional director or by the hearing officer shall not be appealed directly to the Board, but shall be considered by the Board on appropriate appeal pursuant to section 102.67 (b), (c), and (d) or whenever the case is transferred to it for decision: *Provided, however,* That if the regional director has issued an order transferring the case to the Board for decision, such rulings

may be appealed directly to the Board by special permission of the Board. Nor shall rulings by the hearing officer be appealed directly to the regional director, unless expressly authorized by the Rules and Regulations, except by special permission of the regional director, but shall be considered by the regional director when he reviews the entire record. Requests to the regional director, or to the Board in appropriate cases, for special permission to appeal from such rulings of the hearing officer shall be filed promptly, in writing, and shall briefly state the grounds relied on. The moving party shall immediately serve a copy thereof on each of the other parties and on the regional director.

(d) The right to make motions or to make objections to rulings on motions shall not be deemed waived by participation in the proceeding.

SEC. 102.66 *Introduction of evidence; rights of parties at hearing; subpoenas.*—(a) Any party shall have the right to appear at any hearing in person, by counsel, or by other representative, and any party and the hearing officer shall have power to call, examine, and cross-examine witnesses and to introduce into the record documentary and other evidence. Witnesses shall be examined orally under oath. The rules of evidence prevailing in courts of law or equity shall not be controlling. Stipulations of fact may be introduced in evidence with respect to any issue.

(b) Any objection with respect to the conduct of the hearing, including any objection to the introduction of evidence, may be stated orally or in writing, accompanied by a short statement of the grounds of such objection, and included in the record. No such objection shall be deemed waived by further participation in the hearing.

(c) Any party may file applications for subpoenas in writing with the regional director if made prior to hearing, or with the hearing officer if made at the hearing. Applications for subpoenas may be made *ex parte*. The regional director or the hearing officer, as the case may be, shall forthwith grant the subpoenas requested. Any person served with a subpoena, whether *ad testificandum* or *duces tecum*, if he does not intend to comply with the subpoena, shall, within 5 days after the date of service of the subpoena, petition in writing to revoke the subpoena. Such petition shall be filed with the regional director who may either rule upon it or refer it for ruling to the hearing officer: *Provided, however*, That if the evidence called for is to be produced at a hearing and the hearing has opened, the petition to revoke shall be filed with the hearing officer. Notice of the filing of petitions to revoke shall be promptly given by the regional director or hearing officer, as the case may be, to the party at whose request the subpoena

was issued. The regional director or the hearing officer, as the case may be, shall revoke the subpoena if, in his opinion, the evidence whose production is required does not relate to any matter under investigation or in question in the proceedings or the subpoena does not describe with sufficient particularity the evidence whose production is required, or if for any other reason sufficient in law the subpoena is otherwise invalid. The regional director or the hearing officer, as the case may be, shall make a simple statement of procedural or other grounds for his ruling. The petition to revoke, any answer filed thereto, and any ruling thereon shall not become part of the record except upon the request of the party aggrieved by the ruling. Persons compelled to submit data or evidence are entitled to retain or, on payment of lawfully prescribed costs, to procure copies or transcripts of the data or evidence submitted by them.

(d)(1) Misconduct at any hearing before a hearing officer or before the regional director or the Board shall be ground for summary exclusion from the hearing.

(2) Such misconduct of an aggravated character, when engaged in by an attorney or other representative of a party, shall be ground for suspension or disbarment by the Board from further practice before it after due notice and hearing.

(3) The refusal of a witness at any such hearing to answer any question which has been ruled to be proper shall, in the discretion of the hearing officer, be ground for striking all testimony previously given by such witness on related matters.

(e) Any party shall be entitled, upon request, to a reasonable period at the close of the hearing for oral argument, which shall be included in the stenographic report of the hearing.

(f) The hearing officer may submit an analysis of the record to the regional director or the Board but he shall make no recommendations.

(g) Witness fees and mileage shall be paid by the party at whose instance the witness appears.

SEC. 102.67 *Proceedings before the regional director; further hearing; briefs; action by the regional director; appeals from action by the regional director; statement in opposition to appeal; transfer of case to Board; proceedings before the Board; Board action.*—(a) The regional director may proceed, either forthwith upon the record, or after oral argument or the submission of briefs, or further hearing, as he may deem proper, to determine the unit appropriate for the purpose of collective bargaining, to determine whether a question concerning representation exists, and to direct an election, dismiss the petition, or make other disposition of the matter. Any party desiring to submit a brief to the regional director shall file the original and

one copy thereof, which may be a typed carbon copy, within 7 days after the close of the hearing: *Provided, however,* That prior to the close of the hearing and for good cause, the hearing officer may grant an extension of time not to exceed an additional 14 days. Requests for additional time in which to file a brief under authority of this section not addressed to the hearing officer during the hearing shall be made to the regional director, in writing, and copies thereof shall immediately be served on each of the other parties. Requests for extension of time shall be made not later than 8 days before the date such briefs are due in the regional office. No reply brief may be filed except upon special leave of the regional director.

(b) A decision by the regional director upon the record shall set forth his findings, conclusions, and order or direction. The decision of the regional director shall be final: *Provided, however,* That within 10 days after service thereof any party may file seven copies of a request for review with the Board in Washington, D.C. Such request shall be printed or otherwise legibly duplicated: *Provided, however,* That carbon copies shall not be filed and if submitted will not be accepted. Copies thereof shall be served simultaneously on all other parties to the proceeding and the regional director in the same manner used to file with the Board, except that if personal service is made upon the Board, service upon the other parties shall be made in such manner as would reasonably insure receipt by the other parties within 3 days after the date of service upon the Board. A statement of such service shall be filed simultaneously with the Board. The filing of such a request shall not, unless otherwise ordered by the Board, operate as a stay of any action taken or directed by the regional director: *Provided, however,* That the regional director, in the absence of a waiver, may issue a notice of election but shall not conduct any election or open and count any challenged ballots until the Board has ruled upon any request for review which may be filed.

(c) The Board will grant a request for review only where compelling reasons exist therefor. Accordingly, a request for review may be granted only upon one or more of the following grounds:

(1) That a substantial question of law or policy is raised because of (a) the absence of, or (b) a departure from, officially reported Board precedent.

(2) That the regional director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.

(3) That the conduct of the hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.

(4) That there are compelling reasons for reconsideration of an important Board rule or policy.

(d) Any request for review must be a self-contained document enabling the Board to rule on the basis of its contents without the necessity of recourse to the record. With respect to ground (2), and other grounds where appropriate, said request must contain a summary of all evidence or rulings bearing on the issues together with page citations from the transcript and a summary of argument. But such request may not raise any issue or allege any facts not timely presented to the regional director.

(e) Any party may, within 7 days after the last day on which the request for review must be filed, file with the Board seven copies of a statement in opposition thereto, which shall be duplicated and served in accordance with the requirements of subsection (b) of this section; except that if personal service of the request for review is made upon the Board, 10 days will be allowed. However, 3 days will not be added to either of the aforesaid prescribed periods as provided in section 102.114. A statement of such service of opposition shall be filed simultaneously with the Board. The Board may deny the request for review without awaiting a statement in opposition thereto.

(f) The parties may, at any time, waive their right to request review. Failure to request review shall preclude such parties from relitigating, in any related subsequent unfair labor practice proceeding, any issue which was, or could have been, raised in the representation proceeding. Denial of a request for review shall constitute an affirmation of the regional director's action which shall also preclude relitigating any such issues in any related subsequent unfair labor practice proceeding.

(g) The granting of a request for review shall not stay the regional director's decision unless otherwise ordered by the Board. Within 7 days after issuance of an order granting review, the appellants and other parties may file seven copies of a brief with the Board, which shall be duplicated and served in accordance with the requirements of subsection (b) of this section. A statement of such service shall be filed simultaneously with the Board. Such briefs may be reproductions of those previously filed with the regional director and/or other briefs which shall be limited to the issues raised in the request for review. Where review has been granted, the Board will consider the entire record in the light of the grounds relied upon for review. Any request for review may be withdrawn with the permission of the Board at any time prior to the issuance of the decision of the Board thereon.

(h) In any case in which it appears to the regional director that the proceeding raises questions which should be decided by the Board, he may, at any time, issue an order, to be effective after the close of the hearing and before decision, transferring the case to the Board for

decision. Such an order may be served on the parties upon the record of the hearing.

(i) If any case is transferred to the Board for decision after the parties have filed briefs with the regional director, the parties may, within such time after service of the order transferring the case as is fixed by the regional director, file with the Board seven copies of the brief previously filed with the regional director. Such copies shall be printed or otherwise legibly duplicated: *Provided, however,* That carbon copies of typewritten matter shall not be filed and if submitted will not be accepted. No further briefs shall be permitted except by special permission of the Board. If the case is transferred to the Board before the time expires for the filing of briefs with the regional director and before the parties have filed briefs, such briefs shall be filed as set forth above and served in accordance with subsection (b) of this section, within the time set by the regional director. If the order transferring the case is served upon the parties during the hearing, the hearing officer may, prior to the close of the hearing and for good cause, grant an extension of time within which to file a brief with the Board for a period not to exceed an additional 14 days. Requests for extension of time in which to file a brief with the Board under authority of this section not addressed to the hearing officer during the hearing shall be filed in writing with the Board and copies thereof shall immediately be served on each of the other parties and the regional director. Requests for extension of time shall be received by the Board not later than 3 days before the date such briefs are due in Washington, D.C. A copy of any such request shall be served immediately on each of the other parties and the regional director and shall contain a statement that such service has been made. No reply brief may be filed except upon special leave of the Board.

(j) Upon transfer of the case to Board, the Board shall proceed, either forthwith upon the record, or after oral argument or the submission of briefs, or further hearing, as it may determine, to decide the issues referred to it or to review the decision of the regional director, and shall direct a secret ballot of the employees, dismiss the petition, affirm or reverse the regional director's order in whole or in part, or make such other disposition of the matter as it deems appropriate.

SEC. 102.68 *Record; what constitutes; transmission to Board.*—The record in the proceeding shall consist of: the petition, notice of hearing with affidavit of service thereof, motions, rulings, orders, the stenographic report of the hearing and of any oral argument before the regional director, stipulations, exhibits, documentary evidence, affidavits of service, depositions, and any briefs or other documents submitted by the parties to the regional director or to the Board, and the

decision of the regional director, if any. Immediately upon issuance by the regional director of an order transferring the case to the Board, or upon issuance of an order granting a request for review by the Board, the regional director shall transmit the record to the Board.

SEC. 102.69 *Election procedure; tally of ballots; objections; certification by regional director; report on challenged ballots; report on objections; exceptions; action of the Board; hearing.*—(a) Unless otherwise directed by the Board, all elections shall be conducted under the supervision of the regional director in whose region the proceeding is pending. All elections shall be by secret ballot. Whenever two or more labor organizations are included as choices in an election, either participant may, upon its prompt request to and approval thereof by the regional director, whose decision shall be final, have its name removed from the ballot: *Provided, however,* That in a proceeding involving an employer-filed petition or a petition for decertification the labor organization certified, currently recognized, or found to be seeking recognition may not have its name removed from the ballot without giving timely notice in writing to all parties and the regional director, disclaiming any representation interest among the employees in the unit. Any party may be represented by observers of his own selection, subject to such limitations as the regional director may prescribe. Any party and Board agents may challenge, for good cause, the eligibility of any person to participate in the election. The ballots of such challenged persons shall be impounded. Upon the conclusion of the election, the regional director shall cause to be furnished to the parties a tally of ballots. Within 5 days after the tally of ballots has been furnished, any party may file with the regional director four copies of objections to the conduct of the election or conduct affecting the results of the election, which shall contain a short statement of the reasons therefor. Such filing must be timely whether or not the challenged ballots are sufficient in number to affect the results of the election. Copies of such objections shall immediately be served upon each of the other parties by the party filing them, and a statement of service shall be made.

(b) If no objections are filed within the time set forth above, if the challenged ballots are insufficient in number to affect the result of the election, and if no runoff election is to be held pursuant to section 102.70, the regional director shall forthwith issue to the parties a certification of the results of the election, including certification of representatives where appropriate, with the same force and effect as if issued by the Board, and the proceeding will thereupon be closed.

(c) If objections are filed to the conduct of the election or conduct affecting the result of the election, or if the challenged ballots are

sufficient in number to affect the result of the election, the regional director shall investigate such objections or challenges, or both. If a consent election has been held pursuant to section 102.62 (b), the regional director shall prepare and cause to be served upon the parties a report on challenged ballots or objections, or both, including his recommendations, which report, together with the tally of ballots, he shall forward to the Board in Washington, D.C. Within 10 days from the date of issuance of the report on challenged ballots or objections, or both, or within such further period as the Board may allow upon written request to the Board for an extension made not later than 3 days before such exceptions are due in Washington, D.C., with copies of such request served on each of the other parties, any party may file with the Board in Washington, D.C., seven copies of exceptions to such report which shall be printed or otherwise legibly duplicated. Immediately upon the filing of such exceptions, the party filing the same shall serve a copy thereof upon each of the other parties and shall file a copy with the regional director. A statement of service shall be made to the Board simultaneously with the filing of exceptions. If no exceptions are filed to such report, the Board, upon the expiration of the period for filing such exceptions, may decide the matter forthwith upon the record or may make other disposition of the case. The report on challenged ballots may be consolidated with the report on objections in appropriate cases. If the election has been conducted pursuant to a direction of election issued following any proceeding under section 102.67, the regional director may (1) issue a report on objections or challenged ballots, or both, as in the case of a consent election pursuant to section 102.62(b), or (2) exercise his authority to decide the case and issue a decision disposing of the issues and directing appropriate action or certifying the results of the election. In either instance, such action by the regional director may be on the basis of an administrative investigation or, if it appears to the regional director that substantial and material factual issues exist which can be resolved only after a hearing, on the basis of a hearing before a hearing officer, designated by the regional director. If the regional director issues a report on objections and challenges, the parties shall have the rights set forth in subsections (c) and (e) of this section; if the regional director issues a decision, the parties shall have the rights set forth in section 102.67 to the extent consistent herewith.

(d) Any hearing pursuant to this section shall be conducted in accordance with the provisions of sections 102.64, 102.65, and 102.66, insofar as applicable, except that upon the close of such hearing, the hearing officer shall, if directed by the regional director, prepare and

cause to be served upon the parties a report resolving questions of credibility and containing findings of fact and recommendations as to the disposition of the issues. In any case in which the regional director has directed that a report be prepared and served, any party may, within 10 days from the date of issuance of such report, file with the regional director the original and one copy, which may be a carbon copy, of exceptions to such report. A copy of such exceptions shall immediately be served upon each of the other parties and a statement of service filed with the regional director. If no exceptions are filed to such report, the regional director, upon the expiration of the period for filing such exceptions, may decide the matter forthwith upon the record or may make other disposition of the case.

(e) In a case involving a consent election held pursuant to section 102.62(b), if exceptions are filed, either to the report on challenged ballots or objections, or both if it be a consolidated report, and it appears to the Board that such exceptions do not raise substantial and material issues with respect to the conduct or results of the election, the Board may decide the matter forthwith upon the record, or may make other disposition of the case. If it appears to the Board that such exceptions raise substantial and material factual issues, the Board may direct the regional director or other agent of the Board to issue and cause to be served upon the parties a notice of hearing on said exceptions before a hearing officer. The hearing shall be conducted in accordance with the provisions of sections 102.64, 102.65, and 102.66, insofar as applicable. Upon the close of the hearing the agent conducting the hearing, if directed by the Board, shall prepare and cause to be served upon the parties a report resolving questions of credibility and containing findings of fact and recommendations to the Board as to the disposition of the challenges or objections, or both if it be a consolidated report. In any case in which the Board has directed that a report be prepared and served, any party may within 10 days from the date of issuance of the report on challenged ballots or objections, or both, file with the Board in Washington, D.C., seven copies of exceptions to such report: *Provided, however,* That in any proceeding wherein a representation case has been consolidated with an unfair labor practice case for purposes of hearing the provisions of section 102.46 of these rules shall govern with respect to the filing of exceptions to the intermediate report and recommended order. Immediately upon the filing of such exceptions, the party filing the same shall serve a copy thereof upon each of the other parties and shall file a copy with the regional director. A statement of service shall be made to the Board simultaneously with the filing of exceptions. If no exceptions are filed to such report, the Board, upon the expiration of

the period for filing such exceptions, may decide the matter forthwith upon the record or may make other disposition of the case. The Board shall thereupon proceed pursuant to section 102.67.

(f) The notice of hearing, motions, rulings, orders, stenographic report of the hearing, stipulations, exceptions, documentary evidence, all of which, together with the objections to the conduct of the election or conduct affecting the results of the election, any report on such objections, any report on challenged ballots, exceptions to any such report, any briefs or other documents submitted by the parties, the decision of the regional director, if any, and the record previously made as described in section 102.68, shall constitute the record in the case. Immediately upon issuance of a report on objections or challenges, or both, upon issuance by the regional director of an order transferring the case to the Board, or upon issuance of an order granting a request for review by the Board, the regional director shall transmit the record to the Board.

(g) In any such case in which the regional director or the Board, upon a ruling on challenged ballots, has directed that such ballots be opened and counted and a revised tally of ballots issued, and no objection to such revised tally is filed by any party within 3 days after the revised tally of ballots has been furnished, the regional director shall forthwith issue to the parties certification of the results of the election, including certification of representatives where appropriate, with the same force and effect as if issued by the Board. The proceeding shall thereupon be closed.

SEC. 102.70 *Runoff election.*—(a) The regional director shall conduct a runoff election, without further order of the Board, when an election in which the ballot provided for not less than three choices (i.e., at least two representatives and “neither”) results in no choice receiving a majority of the valid ballots cast and no objections are filed as provided in section 102.69. Only one runoff shall be held pursuant to this section.

(b) Employees who were eligible to vote in the election and who are in an eligible category on the date of the runoff election shall be eligible to vote in the runoff election.

(c) The ballot in the runoff election shall provide for a selection between the two choices receiving the largest and second largest number of votes.

(d) In the event the number of votes cast in an inconclusive election in which the ballot provided for a choice among two or more representatives and “neither” or “none” is equally divided among the several choices; or in the event the number of ballots cast for one choice in such election is equal to the number cast for another of the

choices but less than the number cast for the third choice, the regional director shall declare the first election a nullity and shall conduct another election, providing for a selection from among the three choices afforded in the original ballot; and he shall thereafter proceed in accordance with paragraphs (a), (b), and (c) of this section. In the event two or more choices receive the same number of ballots and another choice receives no ballots and there are no challenged ballots that would affect the results of the election, and if all eligible voters have cast valid ballots, there shall be no runoff election and a certification of results of election shall be issued. Only one such further election pursuant to this paragraph may be held.

(e) Upon the conclusion of the runoff election, the provisions of section 102.69 shall govern, insofar as applicable.

SEC. 102.71 *Refusal to issue notice of hearing; appeals to Board from action of the regional director.*—If, after a petition has been filed, and prior to the close of the hearing, it shall appear to the regional director that no further proceedings are warranted, the regional director may dismiss the petition by administrative action and so advise the petitioner in writing, accompanied by a simple statement of the procedural or other grounds for the dismissal. The petitioner may obtain a review of such action by filing a request therefor with the Board in Washington, D.C., and filing a copy of such request with the regional director and each of the other parties within 10 days of service of such notice of dismissal. The request shall be submitted in seven copies and shall contain a complete statement setting forth facts and reasons upon which the request is based. Requests for an extension of time within which to file the request for review shall be filed with the Board in Washington, D.C., and a statement of service shall accompany such request.

SEC. 102.72 *Filing petition with general counsel; investigation upon motion of general counsel; transfer of petition and proceeding from region to general counsel or to another region; consolidation of proceedings in same region; severance; procedure before general counsel in cases over which he has assumed jurisdiction.*—Whenever it appears necessary in order to effectuate the purposes of the act, or to avoid unnecessary costs or delay, the general counsel may permit a petition to be filed with him in Washington, D.C., or may, at any time after a petition has been filed with a regional director pursuant to section 102.60, order that such petition and any proceeding that may have been instituted with respect thereto:

(a) Be transferred to and continued before him, for the purpose of investigation or consolidation with any other proceeding which may have been instituted in a regional office or with him; or

(b) Be consolidated with any other proceeding which may have been instituted in the same region; or

(c) Be transferred to and continued in any other region, for the purpose of investigation or consolidation with any proceeding which may have been instituted in or transferred to such region; or

(d) Be severed from any other proceeding with which it may have been consolidated pursuant to this section.

The provisions of sections 102.60 to 102.71, inclusive, shall, insofar as applicable, apply to proceedings before the general counsel pursuant to this section, and the powers granted to regional directors in such provisions shall, for the purpose of this section, be reserved to and exercised by the general counsel. After the transfer of any petition and any proceeding which may have been instituted in respect thereto from one region to another pursuant to this section, the provisions of this subpart shall, insofar as applicable, govern such petition and such proceeding as if the petition had originally been filed in the region to which the transfer is made.

Subpart D—Procedure for Unfair Labor Practice and Representation Cases Under Sections 8(b)(7) and 9(c) of the Act

SEC. 102.73. *Initiation of proceedings.*—Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of section 8(b)(7) of the act, the regional director shall investigate such charge, giving it the priority specified in subpart G of these rules.

SEC. 102.74. *Complaint and formal proceedings.*—If it appears to the regional director that the charge has merit, formal proceedings in respect thereto shall be instituted in accordance with the procedures described in sections 102.15 to 102.51, inclusive, insofar as they are applicable, and insofar as they are not inconsistent with the provisions of this subpart. If it appears to the regional director that issuance of a complaint is not warranted, he shall decline to issue a complaint, and the provisions of section 102.19, including the provisions for appeal to the general counsel, shall be applicable unless an election has been directed under sections 102.77 and 102.78, in which event the provisions of section 102.81 shall be applicable.

SEC. 102.75. *Suspension of proceedings on the charge where timely petition is filed.*—If it appears to the regional director that issuance of a complaint may be warranted but for the pendency of a petition under section 9(c) of the act, which has been filed by any proper party within a reasonable time not to exceed 30 days from the commencement of picketing, the regional director shall suspend proceedings on the charge and shall proceed to investigate the petition under the

expedited procedure provided below, pursuant to the first proviso to subparagraph (C) of section 8(b)(7) of the act.

SEC. 102.76 *Petition; who may file; where to file; contents.*—When picketing of an employer has been conducted for an object proscribed by section 8(b)(7) of the act, a petition for the determination of a question concerning representation of the employees of such employer may be filed in accordance with the provisions of sections 102.60 and 102.61, insofar as applicable: *Provided, however,* That if a charge under section 102.73 has been filed against the labor organization on whose behalf picketing has been conducted, the petition shall not be required to contain a statement that the employer declines to recognize the petitioner as the representative within the meaning of section 9(a) of the act; or that the labor organization is currently recognized but desires certification under the act; or that the individuals or labor organizations who have been certified or are currently recognized by the employer are no longer the representative; or, if the petitioner is an employer, that one or more individuals or labor organizations have presented to the petitioner a claim to be recognized as the exclusive representative of the employees in the unit claimed to be appropriate.

SEC. 102.77 *Investigation of petition by regional director; directed election.*—(a) Where a petition has been filed pursuant to section 102.76 the regional director shall make an investigation of the matters and allegations set forth therein. Any party, and any individual or labor organization purporting to act as representative of the employees involved and any labor organization on whose behalf picketing has been conducted as described in section 8(b)(7)(C) of the act, may present documentary and other evidence relating to the matters and allegations set forth in the petition.

(b) If after the investigation of such petition or any petition filed under subpart C of these rules, and after the investigation of the charge filed pursuant to section 102.73, it appears to the regional director that an expedited election under section 8(b)(7)(C) is warranted, and that the policies of the act would be effectuated thereby, he shall forthwith proceed to conduct an election by secret ballot of the employees in an appropriate unit, or make other disposition of the matter: *Provided, however,* That in any case in which it appears to the regional director that the proceeding raises questions which cannot be decided without a hearing, he may issue and cause to be served on the parties, individuals, and labor organizations involved a notice of hearing before a hearing officer at a time and place fixed therein. In this event, the method of conducting the hearing and the procedure following, including transfer of the case to the Board, shall be governed insofar as applicable by sections 102.63 to 102.68,

inclusive, except that the parties shall not file briefs without special permission of the regional director or the Board, as the case may be, but shall, however, state their respective legal positions upon the record at the close of the hearing, and except that any request for review of a decision of the regional director shall be filed promptly after the issuance of such decision.

SEC. 102.78 *Election procedure; method of conducting balloting; postballoting procedure.*—If no agreement such as that provided in section 102.79 has been made, the regional director shall fix the time and place of the election, eligibility requirements for voting, and other arrangements for the balloting. The method of conducting the balloting and the postballoting procedure shall be governed, insofar as applicable, by the provisions of sections 102.69 and 102.70, except that the labor organization on whose behalf picketing has been conducted may not have its name removed from the ballot without the consent of the regional director and except that the regional director's rulings on any objections or challenged ballots shall be final unless the Board grants special permission to appeal from the regional director's rulings. Any request for such permission shall be filed promptly, in writing, and shall briefly state the grounds relied upon. The party requesting review shall immediately serve a copy thereof on each other party. A request for review shall not operate as a stay of the regional director's rulings unless so ordered by the Board.

SEC. 102.79 *Consent-election agreements.*—Where a petition has been duly filed, the parties involved may, subject to the approval of the regional director, enter into an agreement governing the method of conducting the election as provided for in section 102.62(a), insofar as applicable.

SEC. 102.80 *Dismissal of petition; refusal to process petition under expedited procedure.*—(a) If, after a petition has been filed pursuant to the provisions of section 102.76, and prior to the close of the hearing, it shall appear to the regional director that further proceedings in respect thereto in accordance with the provisions of section 102.77 are not warranted, he may dismiss the petition by administrative action, and the action of the regional director shall be final, subject to a prompt appeal to the Board on special permission which may be granted by the Board. Upon such appeal the provisions of section 102.71 shall govern insofar as applicable. Such appeal shall not operate as a stay unless specifically ordered by the Board.

(b) If it shall appear to the regional director that an expedited election is not warranted but that proceedings under subpart C of these rules are warranted, he shall so notify the parties in writing with a simple statement of the grounds for his decision.

(c) Where the regional director, pursuant to sections 102.77 and 102.78, has determined that a hearing prior to election is not required to resolve the issues raised by the petition, and has directed an expedited election, any party aggrieved may file a request with the Board for special permission to appeal from such determination. Such request shall be filed promptly, in writing, and shall briefly state the grounds relied upon. The party requesting such appeal shall immediately serve a copy thereof on each other party. Should the Board grant the requested permission to appeal, such action shall not, unless specifically ordered by the Board, operate as a stay of any action by the regional director.

SEC. 102.81 *Resumption of proceedings upon charge held during pendency of petition; review by the general counsel.*—(a) Where an election has been directed by the regional director or the Board in accordance with the provisions of sections 102.77 and 102.78, the regional director shall decline to issue a complaint on the charge, and he shall so advise the parties in writing, accompanied by a simple statement of the procedural or other grounds for his action. The person making the charge may obtain a review of such action by filing a request therefor with the general counsel in Washington, D.C., and filing a copy of the request with the regional director, within 3 days from the service of the notice of such refusal by the regional director. The request shall contain a complete statement setting forth the facts and reasons upon which the request is based. Such request for review shall not operate as a stay of any action by the regional director.

(b) Where an election has not been directed and the petition has been dismissed in accordance with the provisions of section 102.80, the regional director shall resume investigation of the charge and shall proceed in accordance with section 102.74.

SEC. 102.82 *Transfer, consolidation, and severance.*—The provisions of sections 102.33 and 102.72, respecting the filing of a charge or petition with the general counsel and the transfer, consolidation, and severance of proceedings, shall apply to proceedings under this subpart of these rules, except that the provisions of section 102.73 to 102.81, inclusive, shall govern proceedings before the general counsel.

Subpart E—Procedure for Referendum Under Section 9(e) of the Act

SEC. 102.83 *Petition for referendum under section 9(e)(1) of the act; who may file; where to file; withdrawal.*—A petition to rescind the authority of a labor organization to make an agreement requiring as a condition of employment membership in such labor organization may be filed by an employee or group of employees on behalf of

30 percent or more of the employees in a bargaining unit covered by such an agreement. The petition shall be in writing and signed, and either shall be sworn to before a notary public, Board agent, or other person duly authorized by law to administer oaths and take acknowledgments or shall contain a declaration by the person signing it, under the penalties of the Criminal Code, that its contents are true and correct to the best of his knowledge and belief.⁵ Four copies of the petition shall be filed with the regional director wherein the bargaining unit exists or, if the unit exists in two or more regions, with the regional director for any of such regions. The petition may be withdrawn only with the approval of the regional director with whom such petition was filed, except that if the proceeding has been transferred to the Board, pursuant to section 102.67, the petition may be withdrawn only with the consent of the Board. Upon approval of the withdrawal of any petition the case shall be closed.

SEC. 102.84 *Contents of petition to rescind authority.*—

- (a) The name of the employer.
- (b) The address of the establishments involved.
- (c) The general nature of the employer's business.
- (d) A description of the bargaining unit involved.
- (e) The name and address of the labor organization whose authority it is desired to rescind.
- (f) The number of employees in the unit.
- (g) Whether there is a strike or picketing in progress at the establishment involved and, if so, the approximate number of employees participating, and the date such strike or picketing commenced.
- (h) The date of execution and of expiration of any contract in effect covering the unit involved.
- (i) The name and address of the person designated to accept service of documents for petitioners.
- (j) Any other relevant facts.

SEC. 102.85 *Investigation of petition by regional director; consent referendum; directed referendum.*—Where a petition has been filed pursuant to section 102.83 and it appears to the regional director that the petitioner has made an appropriate showing, in such form as the regional director may determine, that 30 percent or more of the employees within a unit covered by an agreement between their employer and a labor organization requiring membership in such labor organization desire to rescind the authority of such labor organization to make such an agreement, he shall proceed to conduct a secret ballot of the employees involved on the question whether they desire to rescind the authority of the labor organization to make such an agree-

⁵ Forms for filing such petitions will be supplied by the regional office upon request.

ment with their employer: *Provided, however,* That in any case in which it appears to the regional director that the proceeding raises questions which cannot be decided without a hearing, he may issue and cause to be served on the parties a notice of hearing before a hearing officer at a time and place fixed therein. The regional director shall fix the time and place of the election, eligibility requirements for voting, and other arrangements of the balloting, but the parties may enter into an agreement, subject to the approval of the regional director, fixing such arrangements. In any such consent agreements, provision may be made for final determination of all questions arising with respect to the balloting by the regional director or by the Board.

SEC. 102.86 *Hearing; posthearing procedure.*—The method of conducting the hearing and the procedure following the hearing, including transfer of the case to the Board, shall be governed, insofar as applicable, by sections 102.63 to 102.68, inclusive.

SEC. 102.87 *Method of conducting balloting; postballoting procedure.*—The method of conducting the balloting and the postballoting procedure shall be governed by the provisions of section 102.69, insofar as applicable.

SEC. 102.88 *Refusal to conduct referendum; appeal to Board.*—If, after a petition has been filed, and prior to the close of the hearing, it shall appear to the regional director that no referendum should be conducted, he shall dismiss the petition by administrative action. Such dismissal shall be in writing and accompanied by a simple statement of the procedural or other grounds. The petitioner may obtain a review of such action by filing a request therefor with the Board in Washington, D.C., and filing a copy of such request with the regional director and each of the other parties within 10 days from the service of notice of such dismissal. The request shall contain a complete statement setting forth the facts and reasons upon which the request is based.

Subpart F—Procedure to Hear and Determine Disputes Under Section 10(k) of the Act

SEC. 102.89 *Initiation of proceedings.*—Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 8(b) of the act, the regional director of the office in which such charge is filed or to which it is referred shall, as soon as possible after the charge has been filed, serve upon the parties a copy of the charge together with a notice of the filing of the charge and shall investigate such charge and if it is deemed appropriate to seek injunctive relief of a district court pursuant to section 10(1) of the act, he shall give it priority over all other

cases in the office except other cases under section 10(1) and cases of like character.

SEC. 102.90 *Notice of filing of charge; notice of hearing; hearing; proceedings before the Board; briefs; determination of dispute.*—If it appears to the regional director that the charge has merit and the parties to the dispute have not submitted satisfactory evidence to the regional director that they have adjusted, or have agreed upon methods for the voluntary adjustment of, the dispute out of which such unfair labor practice shall have arisen, he shall cause to be served on all parties to such dispute a notice of hearing under section 10(k) of the act before a hearing officer at a time and place fixed therein which shall be not less than 10 days after service of the notice of the filing of said charge. The notice of hearing shall contain a simple statement of the issues involved in such dispute. Such notice shall be issued promptly, and, in cases in which it is deemed appropriate to seek injunctive relief pursuant to section 10(1) of the act, shall normally be issued within 5 days of the date upon which injunctive relief is first sought. Hearings shall be conducted by a hearing officer, and the procedure shall conform, insofar as applicable, to the procedure set forth in sections 102.64 to 102.68, inclusive. Upon the close of the hearing, the proceeding shall be transferred to the Board and the Board shall proceed either forthwith upon the record, or after oral argument, or the submission of briefs, or further hearing, to determine the dispute or make other disposition of the matter. Should any party desire to file a brief with the Board, seven copies thereof shall be filed with the Board at Washington, D.C., within 7 days after the close of the hearing: *Provided, however,* That, in cases involving the national defense and so designated in the notice of hearing, no briefs shall be filed, and the parties, after the close of the evidence, may argue orally upon the record their respective contentions and positions: *Provided further,* That, in cases involving the national defense, upon application for leave to file briefs expeditiously made to the Board in Washington, D.C., after the close of the hearing, the Board may for good cause shown grant such leave and thereupon specify the time for filing. Immediately upon such filing, a copy shall be served on the other parties. Such brief shall be printed or otherwise legibly duplicated: *Provided, however,* That carbon copies of typewritten matter shall not be filed and if submitted will not be accepted. Requests for extension of time in which to file a brief under authority of this section shall be in writing and received by the Board in Washington, D.C., 3 days prior to the due date with copies thereof served on each of the other parties. No reply brief may be filed except upon special leave of the Board.

SEC. 102.91 *Compliance with determination; further proceedings.*—If, after issuance of the determination by the Board, the parties

submit to the regional director satisfactory evidence that they have complied with the determination, the regional director shall dismiss the charge. If no satisfactory evidence of compliance is submitted, the regional director shall proceed with the charge under paragraph (4) (D) of section 8(b) and section 10 of the act and the procedure prescribed in sections 102.9 to 102.51, inclusive, shall, insofar as applicable, govern.

SEC. 102.92 *Review of determination.*—The record of the proceeding under section 10(k) and the determination of the Board thereon shall become a part of the record in such unfair labor practice proceeding and shall be subject to judicial review, insofar as it is in issue, in proceedings to enforce or review the final order of the Board under section 10(e) and (f) of the act.

SEC. 102.93 *Alternative procedure.*—If, either before or after service of the notice of hearing, the parties submit to the regional director satisfactory evidence that they have adjusted the dispute, the regional director shall dismiss the charge and shall withdraw the notice of hearing if notice has issued. If, either before or after issuance of notice of hearing, the parties submit to the regional director satisfactory evidence that they have agreed upon methods for the voluntary adjustment of the dispute, the regional director shall defer action upon the charge and shall withdraw the notice of hearing if notice has issued. If it appears to the regional director that the dispute has not been adjusted in accordance with such agreed-upon methods and that an unfair labor practice within the meaning of section 8(b) (4) (D) of the act is occurring or has occurred, he may issue a complaint under section 102.15, and the procedure prescribed in sections 102.9 to 102.51, inclusive, shall, insofar as applicable, govern; and sections 102.90 to 102.92, inclusive, are inapplicable.

Subpart G—Procedure in Cases Under Section 10(j), (l), and (m) of the Act

SEC. 102.94 *Expeditious processing of section 10(j) cases.*—(a) Whenever temporary relief or a restraining order pursuant to section 10(j) of the act has been procured by the Board, the complaint which has been the basis for such temporary relief or restraining order shall be heard expeditiously and the case shall be given priority by the Board in its successive steps following the issuance of the complaint (until ultimate enforcement or dismissal by the appropriate circuit court of appeals) over all other cases except cases of like character and cases under section 10(l) and (m) of the act.

(b) In the event the trial examiner hearing a complaint, concerning which the Board has procured temporary relief or a restraining

order pursuant to section 10(j), recommends a dismissal in whole or in part of such complaint, the chief law officer shall forthwith suggest to the district court which issued such temporary relief or restraining order the possible change in circumstances arising out of the findings and recommendations of the trial examiner.

SEC. 102.95 *Priority of cases pursuant to section 10(l) and (m) of the act.*—(a) Whenever a charge is filed alleging the commission of an unfair labor practice within the meaning of paragraph (4) (A), (B), (C), or (7) of section 8(b) of the act, or section 8(e) of the act, the regional office in which such charge is filed or to which it is referred shall give it priority over all other cases in the office except cases of like character and cases under paragraph (4) (D) of section 8(b) of the act in which it is deemed appropriate to seek injunctive relief of a district court pursuant to section 10(l) of the act.

(b) Whenever a charge is filed alleging the commission of an unfair labor practice within the meaning of subsection (a) (3) or (b) (2) of section 8 of the act, the regional office in which such charge is filed or to which it is referred shall give it priority over all other cases in the office except cases of like character and cases under section 10(l) of the act.

SEC. 102.96 *Issuance of complaint promptly.*—Whenever the regional attorney or other Board officer to whom the matter may be referred seeks injunctive relief of a district court pursuant to section 10(l) of the act, a complaint against the party or parties sought to be enjoined, covering the same subject matter as such application for injunctive relief, shall be issued promptly, normally within 5 days of the date upon which such injunctive relief is first sought, except in those cases under section 10(l) of the act in which the procedure set forth in sections 102.90 to 102.92, inclusive, is deemed applicable.

SEC. 102.97 *Expeditious processing of section 10(l) and (m) cases in successive stages.*—(a) Any complaint issued pursuant to section 102.95(a) or, in a case in which it is deemed appropriate to seek injunctive relief of a district court pursuant to section 10(l) of the act, any complaint issued pursuant to section 102.93 or notice of hearing issued pursuant to section 102.90 shall be heard expeditiously and the case shall be given priority in such successive steps following its issuance (until ultimate enforcement or dismissal by the appropriate circuit court of appeals) over all cases except cases of like character.

(b) Any complaint issued pursuant to section 102.95(b) shall be heard expeditiously and the case shall be given priority in its successive steps following its issuance (until ultimate enforcement or dismissal by the appropriate circuit court of appeals) over all cases except cases of like character and cases under section 10(l) of the act.

Subpart H—Advisory Opinions and Declaratory Orders Regarding Board Jurisdiction

SEC. 102.98 *Petition for advisory opinion; who may file; where to file.*—(a) Whenever a party to a proceeding before any agency or court of any State or Territory is in doubt whether the Board would assert jurisdiction on the basis of its current jurisdictional standards, he may file a petition with the Board for an advisory opinion on whether it would assert jurisdiction on the basis of its current standards.

(b) Whenever an agency or court of any State or Territory is in doubt whether the Board would assert jurisdiction over the parties in a proceeding pending before such agency or court, the agency or court may file a petition with the Board for an advisory opinion on whether the Board would decline to assert jurisdiction on the basis of its current standards.

SEC. 102.99 *Contents of petition for an advisory opinion.*—(a) A petition for an advisory opinion, when filed by a party to a proceeding before an agency or court of a State or Territory, shall allege the following:

- (1) The name of the petitioner.
- (2) The names of all other parties to the proceeding.
- (3) The name of the agency or court.
- (4) The docket number and nature of the proceeding.
- (5) The general nature of the business involved in the proceeding.
- (6) The commerce data relating to the operations of such business.
- (7) Whether the commerce data described in this section are admitted or denied by other parties to the proceeding.
- (8) The findings, if any, of the agency or court respecting the commerce data described in this section.
- (9) Whether a representation or unfair labor practice proceeding involving the same labor dispute is pending before the Board, and, if so, the case number thereof.

Petitions under this subsection shall be in writing and signed, and either shall be sworn to before a notary public, Board agent, or other person duly authorized by law to administer oaths and take acknowledgments or shall contain a declaration by the person signing it, under the penalties of the Criminal Code, that its contents are true and correct to the best of his knowledge and belief.

(b) A petition for an advisory opinion, when filed by an agency or court of a State or Territory, shall allege the following:

- (1) The name of the agency or court.

- (2) The names of the parties to the proceeding.
- (3) The docket number and nature of the proceeding.
- (4) The general nature of the business involved in the proceeding.
- (5) The findings of the agency or court, or in the absence of findings, a statement of the evidence relating to the commerce operations of such business.

(c) Seven copies of such petition shall be filed with the Board in Washington, D.C. Such petition shall be printed or otherwise legibly duplicated: *Provided, however,* That carbon copies of typewritten matter shall not be filed and if submitted will not be accepted.

SEC. 102.100 *Notice of petition; service of petition.*—Upon the filing of a petition, the petitioner shall immediately serve in the manner provided by section 102.112 of these rules a copy of the petition upon all parties to the proceeding and upon the director of the Board's regional office having jurisdiction over the territorial area in which such agency or court is located. A statement of service shall be filed with the petition as provided by section 102.113(b) of these rules.

SEC. 102.101 *Response to petition; service of response.*—Any party served with such petition may, within 5 days after service thereof, respond to the petition, admitting or denying its allegations. Seven copies of such response shall be filed with the Board in Washington, D.C. Such response shall be printed or otherwise legibly duplicated: *Provided, however,* That carbon copies of typewritten matter shall not be filed and if submitted will not be accepted. Such response shall immediately be served upon all other parties to the proceeding, and a statement of service shall be filed in accordance with the provisions of section 102.113(b) of these rules.

SEC. 102.102 *Intervention.*—Any person desiring to intervene shall make a motion for intervention, stating the grounds upon which such person claims to have an interest in the petition. Seven copies of such motion shall be filed with the Board in Washington, D.C. Such motion shall be printed or otherwise legibly duplicated: *Provided, however,* That carbon copies of typewritten matter shall not be filed and if submitted will not be accepted.

SEC. 102.103 *Proceedings before the Board; briefs; advisory opinions.*—The Board shall thereupon proceed, upon the petition, responses, and submission of briefs, to determine whether, on the facts before it, the commerce operations of the employer involved are such that it would or would not assert jurisdiction. Such determination shall be in the form of an advisory opinion and shall be served upon the parties. No briefs shall be filed except upon special permission of the Board.

SEC. 102.104 *Withdrawal of petition.*—The petitioner may withdraw his petition at any time prior to issuance of the Board's advisory opinion.

SEC. 102.105 *Petitions for declaratory orders; who may file; where to file; withdrawal.*—Whenever both an unfair labor practice charge and a representation case relating to the same employer are contemporaneously on file in a regional office of the Board, and the general counsel entertains doubt whether the Board would assert jurisdiction over the employer involved, he may file a petition with the Board for a declaratory order disposing of the jurisdictional issue in the cases. Such petition may be withdrawn at any time prior to the issuance of the Board's order.

SEC. 102.106 *Contents of petition for declaratory order.*—A petition for a declaratory order shall allege the following:

- (a) The name of the employer.
- (b) The general nature of the employer's business.
- (c) The case numbers of the unfair labor practice and representation cases.
- (d) The commerce data relating to the operations of such business.
- (e) Whether any proceeding involving the same subject matter is pending before an agency or court of a State or Territory. Seven copies of the petition shall be filed with the Board in Washington, D.C. Such petition shall be printed or otherwise legibly duplicated: *Provided, however,* That carbon copies of typewritten matter shall not be filed and if submitted will not be accepted.

SEC. 102.107 *Notice of petition; service of petition.*—Upon filing a petition, the general counsel shall immediately serve a copy thereof upon all parties and shall file a statement of service as provided by section 102.113(b) of these rules.

SEC. 102.108 *Response to petition; service of response.*—Any party to the representation or unfair labor practice case may, within 5 days after service thereof, respond to the petition, admitting or denying its allegations. Seven copies of such response shall be filed with the Board in Washington, D.C. Such response shall be printed or otherwise legibly duplicated: *Provided, however,* That carbon copies shall not be filed and if submitted will not be accepted. Such response shall be served upon the general counsel and all other parties, and a statement of service shall be filed as provided by section 102.113(b) of these rules.

SEC. 102.109 *Intervention.*—Any person desiring to intervene shall make a motion for intervention, stating the grounds upon which such person claims to have an interest in the petition. Seven copies of such motion shall be filed with the Board in Washington, D.C. Such

motion shall be printed or otherwise legibly duplicated: *Provided, however,* That carbon copies of typewritten matter shall not be filed and if submitted will not be accepted.

SEC. 102.110 *Proceedings before the Board; briefs; declaratory orders.*—The Board shall thereupon proceed, upon the petition, responses, and submission of briefs, to determine whether, on the facts before it, the commerce operations of the employer involved are such that it would or would not assert jurisdiction over them. Such determination shall be made by a declaratory order, with like effect as in the case of other orders of the Board, and shall be served upon the parties. Any party desiring to file a brief shall file seven copies with the Board in Washington, D.C., with a statement that copies thereof are being served simultaneously upon the other parties.

Subpart I—Service and Filing of Papers

SEC. 102.111 *Service of process and papers; proof of service.*—(a) Charges, complaints and accompanying notices of hearing, final orders, intermediate reports, and subpoenas of the Board, its member, agent, or agency, may be served personally or by registered mail or by telegraph or by leaving a copy thereof at the principal office or place of business of the person required to be served. The verified return by the individual so serving the same, setting forth the manner of such service, shall be proof of the same, and the return post office receipt or telegraph receipt therefor when registered and mailed or telegraphed as aforesaid shall be proof of service of the same.

(b) Process and papers of the Board, other than those specifically named in paragraph (a) of this section, may be forwarded by certified mail. The return post office receipt therefor shall be proof of service of the same.

SEC. 102.112 *Same; by parties; proof of service.*—Service of papers by a party on other parties shall be made by registered mail, or by certified mail, or in any manner provided for the service of papers in a civil action by the law of the State in which the hearing is pending. When service is made by registered mail, or by certified mail, the return post office receipt shall be proof of service. When service is made in any manner provided by such law, proof of service shall be made in accordance with such law.

SEC. 102.113 *Date of service; filing of proof of service.*—(a) The date of service shall be the day when the matter served is deposited in the United States mail or is delivered in person, as the case may be. In computing the time from such date, the provisions of section 102.114 apply.

(b) The person or party serving the papers or process on other parties in conformance with sections 102.111 and 102.112 shall submit a written statement of service thereof to the Board stating the names of the parties served and the date and manner of service. Proof of service as defined in section 102.112 shall be required by the Board only if subsequent to the receipt of the statement of service a question is raised with respect to proper service. Failure to make proof of service does not affect the validity of the service.

SEC. 102.114 *Time; additional time after service by mail.*—(a) In computing any period of time prescribed or allowed by these rules, the day of the act, event, or default after which the designated period of time begins to run, is not to be included. The last day of the period so computed is to be included, unless it is a Sunday or a legal holiday, in which event the period runs until the end of the next day, which is neither a Sunday nor a legal holiday. When the period of time prescribed or allowed is less than 7 days, intermediate Sundays and holidays shall be excluded in the computation. For the purpose of this section a Saturday on which the Board's offices are not open for business shall be considered as a holiday, but a half holiday shall be considered as other days and not as a holiday. Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after service of a notice or other paper upon him, and the notice or paper is served upon him by mail, 3 days shall be added to the prescribed period: *Provided, however,* That 3 days shall not be added if any extension of such time may have been granted.

(b) When the act or any of these rules require the filing of a motion, brief, exception, or other paper in any proceeding, such document must be received by the Board or the officer or agent designated to receive such matter before the close of business of the last day of the time limit, if any, for such filing or extension of time that may have been granted.

Subpart J—Certification and Signature of Documents

SEC. 102.115 *Certification of papers and documents.*—The executive secretary of the Board or, in the event of his absence or disability, whosoever may be designated by the Board in his place and stead shall certify copies of all papers and documents which are a part of any of the files or records of the Board as may be necessary or desirable from time to time.

SEC. 102.116 *Signature of orders.*—The executive secretary or the associate executive secretary or, in the event of their absence or disability, whosoever may be designated by the Board in their place and stead is hereby authorized to sign all orders of the Board.

Subpart K—Records and Information

SEC. 102.117 *Files, records, etc., in exclusive custody of Board and not subject to inspection; formal documents and final opinions and orders subject to inspection.*—(a) The formal documents described as the record in the case or proceeding and defined in sections 102.45, 102.67, and 102.69 are matters of official record and are available for inspection and examination by persons properly and directly concerned, during usual business hours, at the appropriate regional office of the Board or in Washington, D.C., as the case may be. True and correct copies thereof will be certified upon submission of such copies a reasonable time in advance of need and payment of lawfully prescribed costs: *Provided, however,* That if the Board, the general counsel, or the regional director with whom the documents are filed shall find in a particular instance good cause why a matter of official record should be kept confidential, such matter shall not be available for public inspection or examination. Application for such inspection, if desired to be made at the Board's office in Washington, D.C., shall be made to the executive secretary or the general counsel, as the case may be, and, if desired to be made at any regional office, shall be made to the regional director. The executive secretary, the general counsel, or the regional director may, in his discretion, require that the application be made in writing and under oath and set forth the facts upon which the applicant relies to show that he is properly and directly concerned with such inspection and examination. Should the executive secretary, the general counsel, or the regional director, as the case may be, deny any such application, he shall give prompt notice thereof, accompanied by a simple statement of procedural or other grounds.

(b) All final opinions or orders of the Board in the adjudication of cases (except those required for good cause to be held confidential and not cited as precedents) and its Rules and Regulations are available to public inspection during regular business hours at the Board's offices in Washington, D.C. Copies may be obtained upon request made to any regional office of the Board at its address as published in the Federal Register, or to the director of information in Washington, D.C. Subject to the provisions of sections 102.31 and 102.66, all files, documents, reports, memoranda, and records pertaining to the internal management of the Board or to the investigation or disposition of charges or petitions during the nonpublic investigative stages of proceedings and before the institution of formal proceedings, and all matters of evidence obtained by the Board or any of its agents in the course of investigation, which have not been offered in evidence at a hearing before a trial examiner or hearing officer or have not been

made part of an official record by stipulation, whether in the regional offices of the Board or in its principal office in the District of Columbia, are for good cause found by the Board held confidential and are not matters of official record or available to public inspection, unless permitted by the Board, its chairman, the general counsel, or any regional director.

SEC. 102.118 *Same; Board employees prohibited from producing files, records, etc., pursuant to subpoena ad testificandum or subpoena duces tecum, prohibited from testifying in regard thereto.*—No regional director, field examiner, trial examiner, attorney, specially designated agent, general counsel, member of the Board, or other officer or employee of the Board shall produce or present any files, documents, reports, memoranda, or records of the Board or testify in behalf of any party to any cause pending in any court or before the Board, or any other board, commission, or other administrative agency of the United States, or of any State, Territory, or the District of Columbia with respect to any information, facts, or other matter coming to his knowledge in his official capacity or with respect to the contents of any files, documents, reports, memoranda, or records of the Board, whether in answer to a subpoena, subpoena *duces tecum*, or otherwise, without the written consent of the Board or the chairman of the Board if the official or document is subject to the supervision or control of the Board; or the general counsel if the official or document is subject to the supervision or control of the general counsel. Whenever any subpoena *ad testificandum* or subpoena *duces tecum*, the purpose of which is to adduce testimony or require the production of records as described hereinabove, shall have been served upon any such persons or other officer or employee of the Board, he will, unless otherwise expressly directed by the Board or the chairman of the Board or the general counsel, as the case may be, move pursuant to the applicable procedure, whether by petition to revoke, motion to quash, or otherwise, to have such subpoena invalidated on the ground that the evidence sought is privileged against disclosure by this rule: *Provided*, After a witness called by the general counsel has testified in a hearing upon a complaint under section 10(c) of the act, the respondent may move for the production of any statement of such witness in possession of the general counsel, if such statement has been reduced to writing and signed or otherwise approved or adopted by the witness. Such motion shall be granted by the trial examiner. If the general counsel declines to furnish the statement, the testimony of the witness shall be stricken.

Subpart L—Practice Before the Board of Former Employees

SEC. 102.119 *Prohibition of practice before Board of its former regional employees in cases pending in region during employment.*—No person who has been an employee of the Board and attached to any of its regional offices shall engage in practice before the Board or its agents in any respect or in any capacity in connection with any case or proceeding which was pending in any regional office to which he was attached during the time of his employment with the Board.

SEC. 102.120 *Same; application to former employees of Washington staff.*—No person who has been an employee of the Board and attached to the Washington staff shall engage in practice before the Board or its agents in any respect or in any capacity in connection with any case or proceeding pending before the Board or any regional offices during the time of his employment with the Board.

Subpart M—Construction of Rules

SEC. 102.121 *Rules to be liberally construed.*—The Rules and Regulations in this part shall be liberally construed to effectuate the purposes and provisions of the act.

Subpart N—Enforcement of Rights, Privileges, and Immunities Granted or Guaranteed Under Section 222(f), Communications Act of 1934, as Amended, to Employees of Merged Telegraph Carriers

SEC. 102.122 *Enforcement.*—All matters relating to the enforcement of rights, privileges, or immunities granted or guaranteed under section 222(f) of the Communications Act of 1934, as amended, shall be governed by the provisions of subparts A, B, I, J, K, and M of the Rules and Regulations, insofar as applicable, except that reference in subpart B to “unfair labor practices” or “unfair labor practices affecting commerce” shall for the purposes of this article mean the denial of any rights, privileges, or immunities granted or guaranteed under section 222(f) of the Communications Act of 1934, as amended.

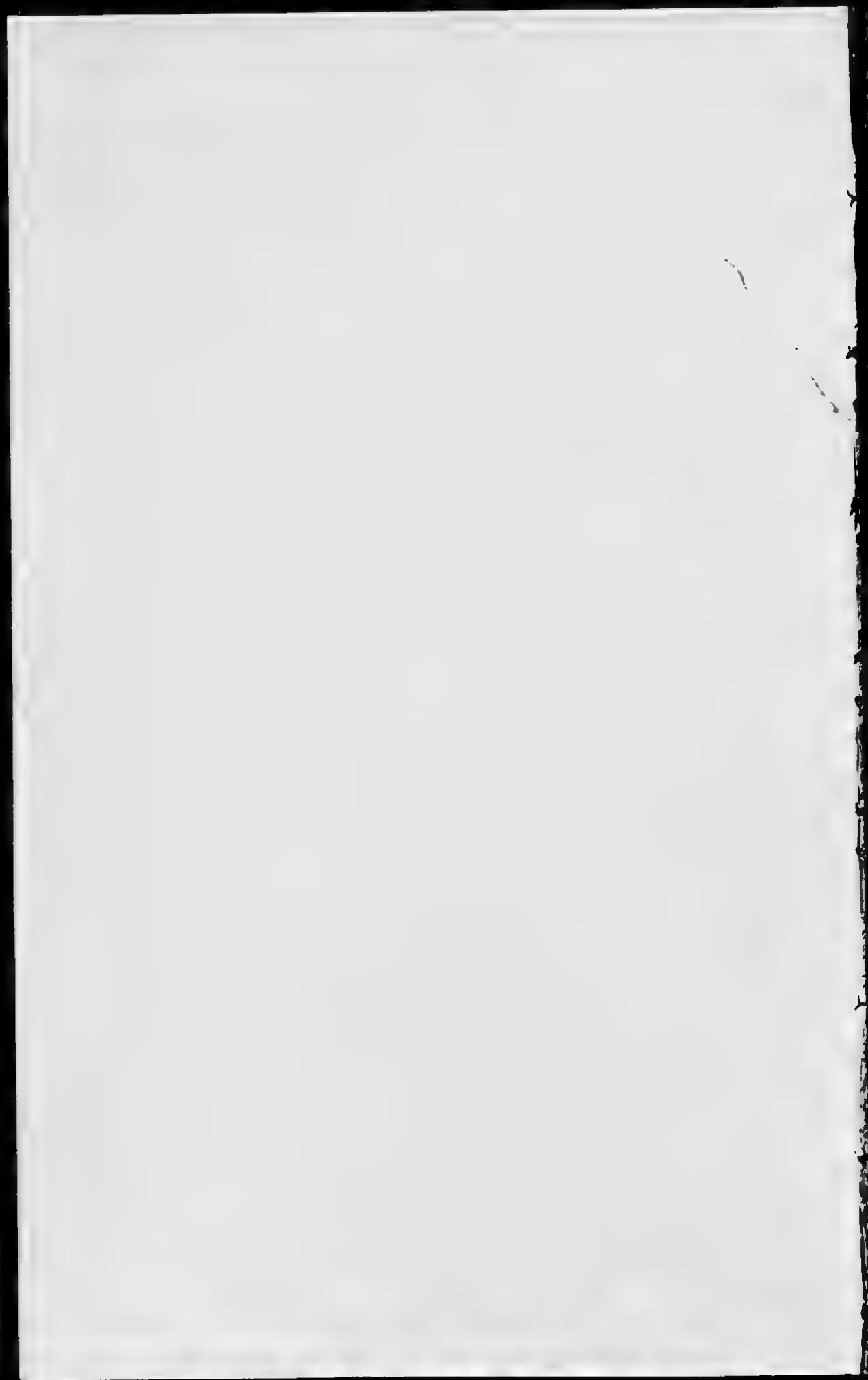
Subpart O—Amendments

SEC. 102.123 *Amendment or rescission of rules.*—Any rule or regulation may be amended or rescinded by the Board at any time.

SEC. 102.124 *Petitions for issuance, amendment, or repeal of rules.*—Any interested person may petition the Board, in writing, for the issuance, amendment, or repeal of a rule or regulation. An

original and five copies of such petition shall be filed with the Board in Washington, D.C., and shall state the rule or regulation proposed to be issued, amended, or repealed, together with a statement of grounds in support of such petition.

SEC. 102.125 *Action on petition.*—Upon the filing of such petition, the Board shall consider the same and may thereupon either grant or deny the petition in whole or in part, conduct an appropriate hearing thereon, or make other disposition of the petition. Should the petition be denied in whole or in part, prompt notice shall be given of the denial, accompanied by a simple statement of the grounds unless the denial is self-explanatory.



STATEMENTS OF PROCEDURE
SERIES 8, AS AMENDED—PART 101

Subpart A—General Statement

SECTION 101.1 *General statement.*—By virtue of the authority vested in it by section 6 of the National Labor Relations Act, 49 Stat. 449, as amended, the National Labor Relations Board has issued and published simultaneously herewith its Rules and Regulations, Series 8. The following statements of the general course and method by which the Board's functions are channeled and determined are issued and published pursuant to section 3(a)(2) of the Administrative Procedure Act.

**Subpart B—Unfair Labor Practice Cases Under Section 10(a)
to (i) of the Act and Telegraph Merger Act Cases**

SEC. 101.2 *Initiation of unfair labor practice cases.*—The investigation of an alleged violation of the National Labor Relations Act is initiated by the filing of a charge, which must be in writing and signed, and must either be notarized or must contain a declaration by the person signing it, under the penalties of the Criminal Code, that its contents are true and correct to the best of his knowledge and belief. The charge is filed with the regional director for the region in which the alleged violations have occurred or are occurring. A blank form for filing such charge is supplied by the regional office upon request. The charge contains the name and address of the person against whom the charge is made and a statement of the facts constituting the alleged unfair labor practices.

SEC. 101.3 *Note.*—This section, which in Series 7 of the Statements of Procedure related to the filing requirements of section 9(f), (g), and (h) of the Labor Management Relations Act, was eliminated by amendments effective September 14, 1959. To avoid the renumbering of sections 101.4 to 101.21 the Board has left this section number blank.

SEC. 101.4 *Investigation of charges.*—When the charge is received in the regional office it is filed, docketed, and assigned a case number. The regional director may cause a copy of the charge to be served upon the person against whom the charge is made, but timely service of a copy of the charge within the meaning of the proviso to section

10(b) of the act is the exclusive responsibility of the charging party and not of the general counsel or his agents. The regional director requests the person filing the charge to submit promptly evidence in its support. As part of the investigation hereinafter mentioned, the person against whom the charge is filed, hereinafter called the respondent, is asked to submit a statement of his position in respect to the allegations. The case is assigned to a member of the field staff for investigation, who interviews representatives of the parties and other persons who have knowledge as to the charges, as is deemed necessary. In the investigation and in all other stages of the proceedings, charges alleging violation of section 8(b)(4)(A), (B), and (C), charges alleging violation of section 8(b)(4)(D) in which it is deemed appropriate to seek injunctive relief under section 10(l) of the act, and charges alleging violations of section 8(b)(7) or 8(e) are given priority over all other cases in the office in which they are pending except cases of like character; and charges alleging violation of section 8(a)(3) or 8(b)(2) are given priority over all other cases except cases of like character and cases under section 10(l) of the act. The regional director may in his discretion dispense with any portion of the investigation described in this section as appears necessary to him in consideration of such factors as the amount of time necessary to complete a full investigation, the nature of the proceeding, and the public interest. After investigation, the case may be disposed of through informal methods such as withdrawal, dismissal, and settlement; or, the case may necessitate formal methods of disposition. Some of the informal methods of handling unfair labor practice cases will be stated first.

SEC. 101.5 *Withdrawal of charges.*—If investigation reveals that there has been no violation of the National Labor Relations Act or the evidence is insufficient to substantiate the charge, the regional director recommends withdrawal of the charge by the person who filed. The complainant may also, on its own initiative, request withdrawal. If the complainant accepts the recommendation of the director or requests withdrawal on its own initiative, the respondent is immediately notified of the withdrawal of the charge.

SEC. 101.6 *Dismissal of charges and appeals to general counsel.*—If the complainant refuses to withdraw the charge as recommended, the regional director dismisses the charge. The regional director thereupon informs the parties of his action, together with a simple statement of the grounds therefor, and the complainant of his right of appeal to the general counsel in Washington, D.C., within 10 days. If the complainant appeals to the general counsel, the entire file in the case is sent to Washington, D.C., where the case is fully reviewed

by the general counsel with the assistance of his staff. Following such review, the general counsel may sustain the regional director's dismissal, stating the grounds of his affirmance, or may direct the regional director to take further action.

SEC. 101.7 *Settlements*.—Before any complaint is issued or other formal action taken, the regional director affords an opportunity to all parties for the submission and consideration of facts, argument, offers of settlement, or proposals of adjustment, except where time, the nature of the proceeding, and the public interest do not permit. Normally prehearing conferences are held, the principal purpose of which is to discuss and explore such submissions and proposals of adjustment. The regional office provides Board-prepared forms for such settlement agreements, as well as printed notices for posting by the respondent. These agreements, which are subject to the approval of the regional director, provide for an appeal to the general counsel, as described in section 101.6, by a complainant who will not join in a settlement or adjustment deemed adequate by the regional director. Proof of compliance is obtained by the regional director before the case is closed. If the respondent fails to perform his obligations under the informal agreement, the regional director may determine to institute formal proceedings.

SEC. 101.8 *Complaints*.—If the charge appears to have merit and efforts to dispose of it by informal adjustment are unsuccessful, the regional director institutes formal action by issuance of a complaint and notice of hearing. In certain types of cases, involving novel and complex issues, the regional director, at the discretion of the general counsel, must submit the case for advice from the general counsel before issuing complaint. The complaint, which is served on all parties, sets forth the facts upon which the Board bases its jurisdiction and the facts relating to the alleged violations of law by the respondent. The respondent must file an answer to the complaint within 10 days of its receipt, setting forth a statement of its defense.

SEC. 101.9 *Settlement after issuance of complaint*.—(a) Even though formal proceedings have begun, the parties again have full opportunity at every stage to dispose of the case by amicable adjustment and in compliance with the law. Thus, after the complaint has been issued and a hearing scheduled or even begun, the attorney in charge of the case and the regional director afford all parties every opportunity for the submission and consideration of facts, argument, offers of settlement, or proposals of adjustment, except where time, the nature of the proceeding, and the public interest do not permit.

(b) All settlement stipulations which provide for the entry of an order by the Board are subject to the approval of the Board in

Washington, D.C. If the settlement provides for the entry of an order by the Board, the parties agree to waive their right to hearing and agree further that the Board may issue an order requiring the respondent to take action appropriate to the terms of the adjustment. Usually the settlement stipulation also contains the respondent's consent to the Board's application for the entry of a decree by the appropriate circuit court of appeals enforcing the Board's order.

(c) In the event the respondent fails to comply with the terms of a settlement stipulation, upon which a Board order and court decree are based, the Board may petition that court to adjudge the respondent in contempt. If the respondent refuses to comply with the terms of a stipulation settlement providing solely for the entry of a Board order, the Board may petition the court for enforcement of its order, pursuant to section 10 of the National Labor Relations Act.

SEC. 101.10 *Hearings*.—(a) Except in extraordinary situations the hearing is open to the public and usually conducted in the region where the charge originated. A duly designated trial examiner presides over the hearing. The Government's case is conducted by an attorney attached to the Board's regional office, who has the responsibility of presenting the evidence in support of the complaint. The rules of evidence applicable in the district courts of the United States under the Rules of Civil Procedure adopted by the Supreme Court are, so far as practicable, controlling. Counsel for the general counsel, all parties to the proceeding, and the trial examiner have the power to call, examine, and cross-examine witnesses and to introduce evidence into the record. They may also submit briefs, engage in oral argument, and submit proposed findings and conclusions to the trial examiner. The attendance and testimony of witnesses and the production of evidence material to any matter under investigation may be compelled by subpoena.

(b) The functions of all trial examiners and other Board agents or employees participating in decisions in conformity with section 8 of the Administrative Procedure Act are conducted in an impartial manner and any such trial examiner, agent, or employee may at any time withdraw if he deems himself disqualified because of bias or prejudice. The Board's attorney has the burden of proof of violations of section 8 of the National Labor Relations Act and section 222(f) of the Telegraph Merger Act. In connection with hearings subject to the provisions of section 7 of the Administrative Procedure Act:

(1) No sanction is imposed or rule or order issued except upon consideration of the whole record or such portions thereof as may be

cited by any party and as supported by and in accordance with the preponderance of the reliable, probative, and substantial evidence;

(2) Every party has the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts; and

(3) Where any decision rests on official notice of a material fact not appearing in the evidence in the record, any party is on timely request afforded a reasonable opportunity to show the contrary.

SEC. 101.11 *Intermediate report (recommended decision).*—(a) At the conclusion of the hearing the trial examiner prepares an intermediate report (recommended decision) stating findings of fact and conclusions, as well as the reasons for his determinations on all material issues, and making recommendations as to action which should be taken in the case. The trial examiner may recommend dismissal or sustain the complaint, in whole or in part, and recommend that the respondent cease and desist from the unlawful acts found and take action to remedy their effects.

(b) The intermediate report is filed with the Board in Washington, D.C., and copies are simultaneously served on each of the parties. At the same time the Board, through its executive secretary, issues and serves on each of the parties an order transferring the case to the Board. The parties may accept and comply with the recommendations of the trial examiner, and thus normally conclude the entire proceedings at this point. Or, the parties or counsel for the Board may file exceptions to the intermediate report with the Board and may also request permission to appear and argue orally before the Board in Washington, D.C. They may also submit proposed findings and conclusions to the Board. Oral argument is very frequently granted.

SEC. 101.12 *Board decision and order.*—(a) If any party files exceptions to the intermediate report, the Board, with the assistance of the legal assistants to each Board member who function in much the same manner as law clerks do for judges, reviews the entire record, including the trial examiner's report and recommendations, the exceptions thereto, the complete transcript of evidence, and the exhibits, briefs, and arguments. The Board does not consult with members of the trial examining staff or with any agent of the general counsel in its deliberations. It then issues its decision and order in which it may adopt, modify, or reject the findings and recommendations of the trial examiner. The decision and order contains detailed findings of fact, conclusions of law, and basic reasons for decision on all material issues raised, and an order either dismissing the complaint in whole or in

part or requiring the respondent to cease and desist from its unlawful practices and to take appropriate affirmative action.

(b) If no exceptions are filed to the intermediate report, and the respondent does not comply with its recommendations, the Board adopts the report and recommendations of the trial examiner. All objections and exceptions, whether or not previously made during or after the hearing, are deemed waived for all purposes.

(c) If no exceptions are filed to the intermediate report and its recommendations and the respondent complies therewith, the case is normally closed but the Board may, if it deems necessary in order to effectuate the policies of the act, adopt the report and recommendations of the trial examiner.

SEC. 101.13 *Compliance with Board decision and order.*—(a) Shortly after the Board's decision and order is issued the director of the regional office in which the charge was filed communicates with the respondent for the purpose of obtaining compliance. Conferences may be held to arrange the details necessary for compliance with the terms of the order.

(b) If the respondent effects full compliance with the terms of the order, the regional director submits a report to that effect to Washington, D.C., after which the case may be closed. Despite compliance, however, the Board's order is a continuing one; therefore, the closing of a case on compliance is necessarily conditioned upon the continued observance of that order; and in some cases it is deemed desirable, notwithstanding compliance, to implement the order with an enforcing decree. Subsequent violations of the order may become the basis of further proceedings.

SEC. 101.14 *Judicial review of Board decision and order.*—If the respondent does not comply with the Board's order, or the Board deems it desirable to implement the order with a court decree, the Board may petition the appropriate Federal court for enforcement. Or, the respondent may petition the circuit court of appeals to review and set aside the Board's order. Upon such review or enforcement proceedings, the court reviews the record and the Board's findings and order and sustains them if they are in accordance with the requirements of law. The court may enforce, modify, or set aside in whole or in part the Board's findings and order, or it may remand the case to the Board for further proceedings as directed by the court. Following the court's decree, either the Government or the private party may petition the Supreme Court for review upon writ of certiorari. Such applications for review to the Supreme Court are handled by the Board through the Solicitor General of the United States.

SEC. 101.15 *Compliance with court decree.*—After a Board order has been enforced by a court decree, the Board has the responsibility of obtaining compliance with that decree. Investigation is made by the regional office of the respondent's efforts to comply. If it finds that the respondent has failed to live up to the terms of the court's decree, the general counsel may, on behalf of the Board, petition the court to hold him in contempt of court. The court may order immediate remedial action and impose sanctions and penalties.

SEC. 101.16 *Backpay proceedings.*—(a) After a Board order directing the payment of backpay has been issued or after enforcement of such order by a court decree, if informal efforts to dispose of the matter prove unsuccessful, the regional director is then authorized at his discretion to issue a "backpay specification" in the name of the Board and a notice of hearing before a trial examiner, both of which are served on the parties involved. The specification sets forth computations showing gross and net backpay due and any other pertinent information. The respondent must file an answer within 15 days of the receipt of the specification, setting forth a particularized statement of its defense.

(b) In the alternative and at his discretion, the regional director, under the circumstances specified above, may issue and serve upon the parties a notice of hearing only, without a specification. Such notice contains, in addition to the time and place of hearing before a trial examiner, a brief statement of the matters in controversy.

(c) The procedure before the trial examiner or the Board whether initiated by the "backpay specification" or by notice of hearing without a backpay specification, is substantially the same as that described in sections 101.10 to 101.14, inclusive.

Subpart C—Representation Cases Under Section 9(c) of the Act

SEC. 101.17 *Initiation of representation case.*—The investigation of the question as to whether a union represents a majority of an appropriate grouping of employees is initiated by the filing of a petition by any person or labor organization acting on behalf of a substantial number of employees or by an employer when one or more individuals or labor organizations present to him a claim to be recognized as the exclusive bargaining representative. If there is a certified or currently recognized representative, any employee, or group of employees, or any individual or labor organization acting in their behalf may also file decertification proceedings to test the question of whether the certified or recognized agent is still the representative of the employees. The petition must be in writing and signed, and either must be notarized or must contain a declaration by the person signing it, under

the penalties of the Criminal Code, that its contents are true and correct to the best of his knowledge and belief. It is filed with the regional director for the region in which the proposed or actual bargaining unit exists. Petition forms, which are supplied by the regional office upon request, provide, among other things, for a description of the contemplated or existing appropriate bargaining unit, the approximate number of employees involved, and the names of all labor organizations which claim to represent the employees. If a petition is filed by a labor organization or in the case of a petition to decertify a certified or recognized bargaining agent, the petitioner must supply, within 48 hours after filing but in no event later than the last day on which the petition might timely be filed, evidence of representation. Such evidence is usually in the form of cards authorizing the labor organization to represent the employees or authorizing the petitioner to file a decertification proceeding.

SEC. 101.18 *Investigation of petition.*—(a) Upon receipt of the petition in the regional office, it is docketed and assigned to a member of the staff, usually a field examiner, for investigation. He conducts an investigation to ascertain (1) whether the employer's operations affect commerce within the meaning of the act, (2) the appropriateness of the unit of employees for the purposes of collective bargaining and the existence of a bona fide question concerning representation within the meaning of the act, (3) whether the election would effectuate the policies of the act and reflect the free choice of employees in the appropriate unit, and (4) whether, if the petitioner is a labor organization seeking recognition, there is a sufficient probability, based on the evidence of representation of the petitioner, that the employees have selected it to represent them. The evidence of representation submitted by the petitioning labor organization or by the person seeking decertification is ordinarily checked to determine the number or proportion of employees who have designated the petitioner, it being the Board's administrative experience that in the absence of special factors the conduct of an election serves no purpose under the statute unless the petitioner has been designated by at least 30 percent of the employees. However, in the case of a petition by an employer, no proof of representation on the part of the labor organization claiming a majority is required and the regional director proceeds with the case if other factors require it unless the labor organization withdraws its claim to majority representation. The field examiner, or other member of the staff, attempts to ascertain from all interested parties whether or not the grouping or unit of employees described in the petition constitutes an appropriate bargaining unit.

(b) The petitioner may on its own initiative request the withdrawal of the petition if the investigation discloses that no question of repre-

sentation exists within the meaning of the statute, because, among other possible reasons, the unit is not appropriate, or a written contract precludes further investigation at that time, or where the petitioner is a labor organization or a person seeking decertification and the showing of representation among the employees is insufficient to warrant an election under the 30-percent principle stated in paragraph (a) of this section.

(c) For the same or similar reasons the regional director may request the petitioner to withdraw its petition. If, despite the regional director's recommendations, the petitioner refuses to withdraw the petition, the regional director then dismisses the petition stating the grounds for his dismissal and informing the petitioner of his right of appeal to the Board in Washington, D.C. The petitioner may within 10 days appeal from the regional director's dismissal by filing such request with the Board in Washington, D.C. After a full review of the file with the assistance of its staff, the Board may sustain the dismissal, stating the grounds of its affirmance, or may direct the regional director to take further action.

SEC. 101.19 *Consent adjustments before formal hearing.*—The Board has devised and makes available to the parties two types of informal consent procedures through which representation issues can be resolved without recourse to formal procedures. These informal arrangements are commonly referred to as (a) consent-election agreement, followed by regional director's determination, and (b) consent-election agreement, followed by Board certification. Forms for use in these informal procedures are available in the regional offices.

(a)(1) The consent-election agreement followed by the regional director's determination of representatives is the most frequently used method of informal adjustment of representation cases. The terms of the agreement providing for this form of adjustment are set forth in printed forms, which are available upon request at the Board's regional offices. Under these terms the parties agree with respect to the appropriate unit, the payroll period to be used as the basis of eligibility to vote in an election, and the place, date, and hours of balloting. A Board agent arranges the details incident to the mechanics and conduct of the election. For example, he usually arranges preelection conferences in which the parties check the list of voters and attempt to resolve any questions of eligibility. Also, prior to the date of election, the holding of such election shall be adequately publicized by the posting of official notices in the establishment whenever possible or in other places, or by the use of other means considered appropriate and effective. These notices reproduce a sample ballot and outline such election details as location of polls, time of voting, and eligibility rules.

(2) The actual polling is always conducted and supervised by Board agents. Appropriate representatives of each party may assist them and observe the election. As to the mechanics of the election, a ballot is given to each eligible voter by the Board's agents. The ballots are marked in the secrecy of a voting booth. The Board agents and authorized observers have the privilege of challenging for reasonable cause employees who apply for ballots.

(3) Customarily the Board agents, in the presence and with the assistance of the authorized observers, count and tabulate the ballots immediately after the closing of the polls. A complete tally of the ballots is served upon the parties upon the conclusion of the count.

(4) If challenged ballots are sufficient in number to affect the results of the count, the regional director conducts an investigation and rules on the challenges. Similarly, if objections to the conduct of the election are filed within 5 days of the issuance of the tally of ballots, the regional director likewise conducts an investigation and rules upon the objections. If, after investigation, the objections are found to have merit, the regional director may void the election results and conduct a new election.

(5) This form of agreement provides that the rulings of the regional director on all questions relating to the election (for example, eligibility to vote and the validity of challenges and objections) are final and binding. Also, the agreement provides for the conduct of a runoff election, in accordance with the provisions of the Board's Rules and Regulations, if two or more labor organizations appear on the ballot and no one choice receives the majority of the valid votes cast.

(6) The regional director issues to the parties a certification of the results of the election, including certification of representatives where appropriate, with the same force and effect as if issued by the Board.

(b) The consent-election agreement followed by a Board determination provides that disputed matters following the agreed-upon election, if determinative of the results, shall be the basis of a formal decision by the Board instead of an informal determination by the regional director. Thus, it is provided that the Board, rather than the regional director, makes the final determination of questions raised concerning eligibility, challenged votes, and objections to the conduct of the election. Thus, if challenged ballots are sufficient in number to affect the results of the count, the regional director conducts an investigation and issues a report on the challenges instead of ruling thereon. Similarly, if objections to the conduct of the election are filed within 5 days after issuance of the tally of ballots, the regional director likewise conducts an investigation and issues a report

instead of ruling upon the validity of the objections. In either event, the regional director's report is served upon the parties, who may file exceptions thereto within 10 days with the Board in Washington, D.C. The Board then reviews the entire record made and may, if a substantial issue is raised, direct a hearing on the challenged ballots or the objections to the conduct of the election. Or, the Board may, if no substantial issues are raised, affirm the regional director's report and take appropriate action in termination of the proceedings. If a hearing is held upon the challenged ballots or objections, all parties are heard and, if directed by the Board, a report containing findings of fact and recommendations as to the disposition of the challenges or objections, or both, and resolving issues of credibility is issued by the hearing officer and served upon the parties, who may file exceptions thereto within 10 days with the Board in Washington, D.C. The record made on the hearing is reviewed by the Board with the assistance of its legal assistants and a final determination made thereon. If the objections are found to have merit, the election results may be voided and a new election conducted under the supervision of the regional director. If the union has been selected as the representative, the Board or the regional director, as the case may be, issues its certification, and the proceeding is terminated. If upon a decertification or employer petition the union loses the election, the Board or the regional director, as the case may be, certifies that the union is not the chosen representative.

Sec. 101.20 *Formal hearing.*—(a) If no informal adjustment of the question concerning representation has been effected and it appears to the regional director that formal action is necessary, the regional director will institute formal proceedings by issuance of a notice of hearing on the issues, which is followed by a decision and direction of election or dismissal of the case. In certain types of cases, involving novel or complex issues, the regional director may submit the case for advice to the Board before issuing notice of hearing.

(b) The notice of hearing, together with a copy of the petition, is served upon the unions and employer filing or named in the petition and upon other known persons or labor organizations claiming to have been designated by employees involved in the proceeding.

(c) The hearing, usually open to the public, is held before a hearing officer who normally is an attorney or field examiner attached to the regional office but may be another qualified official. The hearing, which is nonadversary in character, is part of the investigation in which the primary interest of the Board's agents is to insure that the record contains as full a statement of the pertinent facts as may be necessary for determination of the case. The parties are afforded full

opportunity to present their respective positions and to produce the significant facts in support of their contentions. In most cases a substantial number of the relevant facts are undisputed and stipulated. The parties are permitted to argue orally on the record before the hearing officer.

SEC. 101.21 *Procedure after hearing.*—(a) Pursuant to section 3(b) of the act, the Board has delegated to its regional directors its powers under section 9 of the act, to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot under subsection (c) or (e) of section 9 and certify the results thereof. These powers include the issuance of such decisions, orders, rulings, directions, and certifications as are necessary to process any representation or deauthorization petition. Thus, by way of illustration and not of limitation, the regional director may dispose of petitions by administrative dismissal or by decision after formal hearing; pass upon rulings made at hearings and requests for extensions of time for filing of briefs; rule on objections to elections and challenged ballots in connection with elections directed by the regional director or the Board, after administrative investigation or formal hearing; rule on motions to amend or rescind any certification issued after the effective date of the delegation; and entertain motions for oral argument. The regional director may at any time transfer the case to the Board for decision, but until such action is taken, it will be presumed that the regional director will decide the case. In the event the regional director decides the issues in a case, his decision is final subject to the review procedure set forth in the Board's Rules and Regulations.

(b) Upon the close of the hearing, the entire record in the case is forwarded to the regional director or, upon issuance by the regional director of an order transferring the case, to the Board in Washington, D.C. The hearing officer also transmits an analysis of the issues and the evidence, but makes no recommendations in regard to resolution of the issues. All parties may file briefs with the regional director or, if the case is transferred to the Board at the close of the hearing, with the Board, within 7 days after the close of the hearing. If the case is transferred to the Board after the close of the hearing, briefs may be filed with the Board within the time prescribed by the regional director. The parties may also request to be heard orally. Because of the nature of the proceedings, however, permission to argue orally is rarely granted. After review of the entire case, the regional director or the Board issues a decision, either dismissing the petition or directing that an election be held. In the latter event, the

election is conducted under the supervision of the regional director in the manner already described in section 101.19.

(c) With respect to objections to the conduct of the election and challenged ballots, the regional director may, in his discretion, (1) issue a report on such objections and/or challenged ballots and transmit the issues to the Board for resolution, as in cases involving consent elections to be followed by Board certifications, or (2) decide the issues on the basis of the administrative investigation or after a hearing, with the right to transfer the case to the Board for decision at any time prior to his disposition of the issues on the merits. In the event the regional director adopts the first procedure, the parties have the same rights, and the same procedure is followed, as has already been described in connection with the postelection procedures in cases involving consent election to be followed by Board certification. In the event the regional director adopts the second procedure, the parties have the same rights, and the same procedure is followed, as has already been described in connection with hearings before elections.

(d) The parties have the right to request review of any final decision of the regional director, within the times set forth in the Board's Rules and Regulations, on one or more of the grounds specified therein. Any such request for review must be a self-contained document permitting the Board to rule on the basis of its contents without the necessity of recourse to the record, and must meet the other requirements of the Board's Rules and Regulations as to its contents. The regional director's action is not stayed by the filing of such a request or the granting of review, unless otherwise ordered by the Board. Thus, the regional director may proceed immediately to make any necessary arrangements for an election, including the issuance of a notice of election. However, unless a waiver is filed, he will normally not schedule an election until a date between the 20th and 30th days after the date of his decision, to permit the Board to rule on any request for review which may be filed. As to administrative dismissals prior to the close of hearing, see section 101.18(c).

(e) If the election involves two or more labor organizations and if the election results are inconclusive because no choice on the ballot received the majority of valid votes cast, a runoff election is held as provided in the Board's Rules and Regulations.

Subpart D—Unfair Labor Practice and Representation Cases Under Sections 8(b)(7) and 9(c) of the Act

SEC. 101.22 *Initiation and investigation of a case under section 8(b)(7).*—(a) The investigation of an alleged violation of section 8(b)(7) of the act is initiated by the filing of a charge. The manner

of filing such charge and the contents thereof are the same as described in section 101.2. In some cases, at the time of the investigation of the charge, there may be pending a representation petition involving the employees of the employer named in the charge. In those cases, the results of the investigation of the charge will determine the course of the petition.

(b) The investigation of the charge is conducted in accordance with the provisions of section 101.4, insofar as they are applicable. If the investigation reveals that there is merit in the charge, a complaint is issued as described in section 101.8, and an application is made for an injunction under section 10(1) of the act, as described in section 101.37. If the investigation reveals that there is no merit in the charge, the regional director, absent a withdrawal of the charge, dismisses it, subject to appeal to the general counsel. However, if the investigation reveals that issuance of a complaint may be warranted but for the pendency of a representation petition involving the employees of the employer named in the charge, action on the charge is suspended pending the investigation of the petition as provided in section 101.23.

SEC. 101.23 *Initiation and investigation of a petition in connection with a case under section 8(b)(7).*—(a) A representation petition¹ involving the employees of the employer named in the charge is handled under an expedited procedure when the investigation of the charge has revealed that: (1) the employer's operations affect commerce within the meaning of the act; (2) picketing of the employer is being conducted for an object proscribed by section 8(b)(7) of the act; (3) subparagraph (C) of that section is applicable to the picketing; and (4) the petition has been filed within a reasonable period of time not to exceed 30 days from the commencement of the picketing. In these circumstances, the member of the regional director's staff, to whom the matter has been assigned, investigates the petition to ascertain further: (1) the unit appropriate for collective bargaining; and (2) whether an election would in that unit effectuate the policies of the act.

(b) If, based on such investigation, the regional director determines that an election is warranted, he may, without a prior hearing, direct that an election be held in an appropriate unit of employees. Any party aggrieved may file a request with the Board for special permission to appeal that action to the Board, but such review, if granted, will not, unless otherwise ordered by the Board, stay the pro-

¹ The manner of filing of such petition and the contents thereof are the same as described in sec. 101.17, except that the petitioner is not required to allege that a claim was made upon the employer for recognition or that the union represents a substantial number of employees.

ceeding. If the regional director determines that an election is not warranted, he dismisses the petition or makes other disposition of the matter. Should he conclude that an election is warranted, he fixes the basis of eligibility of voters and the place, date, and hours of balloting. The mechanics of arranging the balloting, the other procedures for the conduct of the election, and the postelection proceedings are the same, insofar as appropriate, as those described in section 101.19, except that the regional director's rulings on any objections to the conduct of the election or challenged ballots are final and binding, unless the Board, on an application by one of the parties, grants such party special permission to appeal from the regional director's rulings. The party requesting such review by the Board must do so promptly, in writing, and state briefly the grounds relied upon. Such party must also immediately serve a copy on each of the other parties, including the regional director. Neither the request for review by the Board nor the Board's grant of such review operates as a stay of any action taken by the regional director, unless specifically so ordered by the Board. If the Board grants permission to appeal, and it appears to the Board that substantial and material factual issues have been presented with respect to the objections to the conduct of the election or challenged ballots, it may order that a hearing be held on such issues or take other appropriate action.

(c) If the regional director believes, after preliminary investigation of the petition, that there are substantial issues which require determination before an election may be held, he may order a hearing on the issues. This hearing is followed by regional director or Board decision and direction of election, or other disposition. The procedures to be used in connection with such hearing and posthearing proceedings are the same, insofar as they are applicable, as those described in sections 101.20 and 101.21, except that the parties may not file briefs with the regional director or the Board, unless special permission therefor is granted, but may state their respective legal positions fully on the record at the hearing, and except that any request for review must be filed promptly after issuance of the regional director's decision.

(d) Should the parties so desire, they may, with the approval of the regional director, resolve the issues as to the unit, the conduct of the balloting, and related matters pursuant to informal consent procedures, as described in section 101.19(a).

(e) If a petition has been filed which does not meet the requirements for processing under the expedited procedure, the regional director may process it under the procedures set forth in subpart C.

SEC. 101.24 *Final disposition of a charge which has been held pending investigation of the petition.*—(a) Upon the determination

that the issuance of a direction of election is warranted on the petition, the regional director, absent withdrawal of the charge, dismisses it subject to an appeal to the general counsel in Washington, D.C.

(b) If, however, the petition is dismissed or withdrawn, the investigation of the charge is resumed, and the appropriate steps described in section 101.22 are taken with respect to it.

SEC. 101.25 *Appeal from the dismissal of a petition, or from the refusal to process it under the expedited procedure.*—If the regional director determines after his investigation of the representation petition that further proceedings based thereon are not warranted, he, absent withdrawal of the petition, dismisses it, stating the grounds therefor. If the regional director determines that the petition does not meet the requirements for processing under the expedited procedure, he advises the petitioner of his determination to process the petition under the procedures described in subpart C. In either event, the regional director informs all the parties of his action, and such action is final, although the Board may grant an aggrieved party permission to appeal from the regional director's action. Such party must request such review promptly, in writing, and state briefly the grounds relied upon. Such party must also immediately serve a copy on each of the other parties, including the regional director. Neither the request for review by the Board, nor the Board's grant of such review, operates as a stay of the action taken by the regional director, unless specifically so ordered by the Board.

Subpart E—Referendum Cases Under Section 9(e)(1) and (2) of the Act

SEC. 101.26 *Initiation of rescission of authority cases.*—The investigation of the question as to whether the authority of a labor organization to make an agreement requiring membership in a labor organization as a condition of employment is to be rescinded is initiated by the filing of a petition by an employee or group of employees on behalf of 30 percent or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization requiring membership in such labor organization. The petition must be in writing and signed, and either must be notarized or must contain a declaration by the person signing it, under the penalties of the Criminal Code, that its contents are true and correct to the best of his knowledge and belief. It is filed with the regional director for the region in which the alleged appropriate bargaining unit exists or, if the bargaining unit exists in two or more regions, with the regional director for any such regions. The blank form, which is supplied by the regional office upon request, provides, among other things, for a description of

the bargaining unit covered by the agreement, the approximate number of employees involved, and the names of any other labor organizations which claim to represent the employees. Petitioner must supply with the petition, or within 48 hours after filing, its evidence of authorization from the employees.

SEC. 101.27 *Investigation of petition; withdrawals and dismissals.*—(a) Upon receipt of the petition in the regional office, it is filed, docketed, and assigned to a member of the staff, usually a field examiner, for investigation. He conducts an investigation to ascertain (1) whether the employer's operations affect commerce within the meaning of the act, (2) whether there is in effect an agreement requiring as a condition of employment membership in a labor organization, (3) whether petitioner has been authorized by at least 30 percent of the employees to file such a petition, and (4) whether an election would effectuate the policies of the act by providing for a free expression of choice by the employees. The evidence of designation submitted by petitioner, usually in the form of cards signed by individual employees authorizing the filing of such a petition, is checked to determine the proportion of employees who desire rescission.

(b) Petitioner may on its own initiative request the withdrawal of the petition if the investigation discloses that an election is inappropriate, because, among other possible reasons, petitioner's card-showing is insufficient to meet the 30-percent statutory requirement referred to in paragraph (a) of this section.

(c) For the same or similar reasons the regional director may request the petitioner to withdraw its petition. If petitioner, despite the regional director's recommendation, refuses to withdraw the petition, the regional director then dismisses the petition, stating the grounds for his dismissal and informing petitioner of his right of appeal to the Board in Washington, D.C. The petitioner may within 10 days appeal from the regional director's dismissal by filing such request with the Board in Washington, D.C. The request shall contain a complete statement setting forth the facts and reasons upon which the request is made. After a full review of the file, the Board, with the assistance of its staff, may sustain the dismissal, stating the grounds for its affirmance, or may direct the regional director to take further action.

SEC. 101.28 *Consent agreements providing for election.*—The Board makes available to the parties two types of informal consent procedures through which authorization issues can be resolved without resort to formal procedures. These informal agreements are commonly referred to as (a) consent-election agreement, followed by

regional director's determination, and (b) consent-election agreement, followed by Board certification. Forms for use in these informal procedures are available in regional offices.

The procedures to be used in connection with a consent-election agreement providing for regional director's determination and a consent-election agreement providing for Board certification are the same as those already described in subpart C of the Statements of Procedure in connection with similar agreements in representation cases under section 9(c) of the act, except that no provision is made for runoff elections.

SEC. 101.29 *Procedure respecting election conducted without hearing.*—If the regional director determines that the case is an appropriate one for election without formal hearing, an election is conducted as quickly as possible among the employees and upon the conclusion of the election the regional director furnishes to the parties a tally of ballots. The parties, however, have an opportunity to make appropriate challenges and objections to the conduct of the election and they have the same rights, and the same procedure is followed, with respect to objections to the conduct of the election and challenged ballots, as has already been described in subpart C of the Statements of Procedure in connection with the postelection procedures in representation cases under section 9(c) of the act, except that no provision is made for a runoff election. If no such objections are filed within 5 days and if the challenged ballots are insufficient in number to affect the results of the election, the regional director issues to the parties a certification of the results of the election, with the same force and effect as if issued by the Board.

SEC. 101.30 *Formal hearing and procedure respecting election conducted after hearing.*—(a) The procedures are the same as those described in subpart C of the Statements of Procedure respecting representation cases arising under section 9(c) of the act. If the preliminary investigation indicates that there are substantial issues which require determination before an appropriate election may be held, the regional director will institute formal proceedings by issuance of a notice of hearing on the issues which, after hearing, is followed by regional director or Board decision and direction of election or dismissal. The notice of hearing together with a copy of the petition is served upon petitioner, the employer, and upon any other known persons or labor organizations claiming to have been designated by employees involved in the proceeding.

(b) The hearing, usually open to the public, is held before a hearing officer who normally is an attorney or field examiner attached to the regional office but may be another qualified official. The hearing,

which is nonadversary in character, is part of the investigation in which the primary interest of the Board's agents is to insure that the record contains as full a statement of the pertinent facts as may be necessary for determination of the case. The parties are afforded full opportunity to present their respective positions and to produce the significant facts in support of their contentions. In most cases a substantial number of the relevant facts are undisputed and stipulated. The parties are permitted to argue orally on the record before the hearing officer.

(c) Upon the close of the hearing, the entire record in the case is then forwarded to the regional director or the Board, together with an informal analysis by the hearing officer of the issues and the evidence but without recommendations. All parties may file briefs with the regional director or the Board within 7 days after the close of the hearing. If the case is transferred to the Board after the close of the hearing, briefs may be filed with the Board within the time prescribed by the regional director. The parties may also request to be heard orally. Because of the nature of the proceeding, however, permission to argue orally is rarely granted. After review of the entire case, the Board issues a decision either dismissing the petition or directing that an election be held. In the latter event, the election is conducted under the supervision of the regional director in the manner already described in section 101.19.

(d) The parties have the same rights, and the same procedure is followed, with respect to objections to the conduct of the election and challenged ballots as has already been described in connection with the postelection procedures in representation cases under section 9(c) of the act.

Subpart F—Jurisdictional Dispute Cases Under Section 10(k) of the Act

SEC. 101.31 *Initiation of proceedings to hear and determine jurisdictional disputes under section 10(k).*—The investigation of a jurisdictional dispute under section 10(k) is initiated by the filing of a charge, as described in section 101.2, by any person alleging a violation of paragraph (4)(D) of section 8(b). As soon as possible after a charge has been filed, the regional director serves upon the parties a copy of the charge together with a notice of the filing of such charge.

SEC. 101.32 *Investigation of charges; withdrawal of charges; dismissal of charges and appeals to Board.*—These matters are handled as described in section 101.4 to 101.7, inclusive. Cases involving violation of paragraph (4)(D) of section 8(b) in which it is deemed appropriate to seek injunctive relief of a district court pursuant to section

10(1) of the act, are given priority over all other cases in the office except other cases under section 10(1) of the act and cases of like character.

SEC. 101.33 *Initiation of formal action; settlement.*—If, after investigation, it appears to the regional director that the Board should determine the dispute under section 10(k) of the act, he issues a notice of hearing which includes a simple statement of issues involved in the jurisdictional dispute and which is served on all parties to the dispute out of which the unfair labor practice is alleged to have arisen. The hearing is scheduled for not less than 10 days after service of the notice of the filing of the charge, except that in cases involving the national defense, agreement will be sought for scheduling of hearing on less notice. If the parties present to the regional director satisfactory evidence that they have adjusted the dispute, the regional director withdraws the notice of hearing and either permits the withdrawal of the charge or dismisses the charge. If the parties submit to the regional director satisfactory evidence that they have agreed upon methods for the voluntary adjustment of the dispute, the regional director shall defer action upon the charge and shall withdraw the notice of hearing if issued. The parties may agree on an arbitrator, a proceeding under section 9(c) of the act, or any other satisfactory method to resolve the dispute.

SEC. 101.34 *Hearing.*—If the parties have not adjusted the dispute or agreed upon methods of voluntary adjustment, a hearing, usually open to the public, is held before a hearing officer. The hearing is nonadversary in character, and the primary interest of the hearing officer is to insure that the record contains as full a statement of the pertinent facts as may be necessary for a determination of the issues by the Board. All parties are afforded full opportunity to present their respective positions and to produce evidence in support of their contentions. The parties are permitted to argue orally on the record before the hearing officer. At the close of the hearing, the case is transmitted to the Board for decision. The hearing officer prepares an analysis of the issues and the evidence, but makes no recommendations in regard to resolution of the dispute.

SEC. 101.35 *Procedure before the Board.*—The parties have 7 days after the close of the hearing, subject to any extension that may have been granted, to file briefs with the Board and to request oral argument which the Board may or may not grant. However, in cases involving the national defense and so designated in the notice of hearing, the parties may not file briefs but after the close of the evidence may argue orally upon the record their respective contentions and positions, except that for good cause shown in an application expeditiously

made to the Board in Washington, D.C., after the close of the hearing, the Board may grant leave to file briefs in such time as it shall specify. The Board then considers the evidence taken at the hearing and the hearing officer's analysis together with any briefs that may be filed and the oral argument, if any, and issues its determination or makes other disposition of the matter.

SEC. 101.36 *Compliance with determination; further proceedings.*—After the issuance of determination by the Board, the regional director in the region in which the proceeding arose communicates with the parties for the purpose of ascertaining their intentions in regard to compliance. Conferences may be held for the purpose of working out details. If the regional director is satisfied that the parties are complying with the determination, he dismisses the charge. If the regional director is not satisfied that the parties are complying, he issues a complaint and notice of hearing, charging violation of section 8(b)(4)(D) of the act, and the proceeding follows the procedure outlined in sections 101.8 to 101.15, inclusive.

Subpart G—Procedure Under Section 10(j) and (l) of the Act

SEC. 101.37 *Application for temporary relief or restraining orders.*—Whenever it is deemed advisable to seek temporary injunctive relief under section 10(j) or whenever it is determined that a complaint should issue alleging violation of section 8(b)(4)(A), (B), or (C), or section 8(e), or section 8(b)(7), or whenever it is appropriate to seek temporary injunctive relief for a violation of section 8(b)(4)(D), the officer or regional attorney to whom the matter has been referred will make application for appropriate temporary relief or restraining order in the district court of the United States within which the unfair labor practice is alleged to have occurred or within which the party sought to be enjoined resides or transacts business, except that such officer or regional attorney will not apply for injunctive relief under section 10(l) with respect to an alleged violation of section 8(b)(7) if a charge under section 8(a)(2) has been filed and after preliminary investigation, he has reasonable cause to believe that such charge is true and that a complaint should issue.

SEC. 101.38 *Change of circumstances.*—Whenever a temporary injunction has been obtained pursuant to section 10(j) and thereafter the trial examiner hearing the complaint, upon which the determination to seek such injunction was predicated, recommends dismissal of such complaint, in whole or in part, the officer or regional attorney handling the case for the Board suggests to the district court which issued the temporary injunction the possible change in circumstances arising out of the findings and recommendations of the trial examiner.

Subpart H—Advisory Opinions and Declaratory Orders Regarding Board Jurisdiction

SEC. 101.39 *Initiation of advisory opinion case.*—The question of whether the Board will assert jurisdiction over a labor dispute which is the subject of a proceeding in an agency or court of a State or Territory is initiated by the filing of a petition with the Board. This petition may be filed only if (a) a proceeding is currently pending before such agency or court, and (b) the petitioner is a party to such proceedings before such agency or court or is the agency or court itself. The petition must be in writing and signed. When a petition is filed by a private party, it shall either be sworn to or shall contain a declaration under the penalties of the Criminal Code that its contents are true and correct. It is filed with the executive secretary of the Board in Washington, D.C. No particular form is required, but the petition must be properly captioned and must contain the allegations required by section 102.99 of the Rules and Regulations. None of the information sought relates to the merits of the dispute. The petition may be withdrawn at any time before the Board issues its advisory opinion determining whether it would or would not assert jurisdiction on the basis of the facts before it.

SEC. 101.40 *Proceedings following the filing of the petition.*—(a) A copy of the petition is served upon all other parties and the appropriate regional director by the petitioner.

(b) Interested persons may request intervention by a written motion to the Board. Such intervention may be granted in the discretion of the Board.

(c) Parties other than the petitioner may reply to the petition in writing, admitting or denying any or all of the matters asserted therein.

(d) No briefs shall be filed except upon special permission of the Board.

(e) After review of the entire record, the Board issues an advisory opinion as to whether the facts presented would or would not cause it to assert jurisdiction over the case if the case had been originally filed before it. The Board will limit its advisory opinion to the jurisdictional issue confronting it, and will not presume to render an opinion on the merits of the case or on the question of whether the subject matter of the dispute is governed by the Labor Management Relations Act of 1947, as amended.

SEC. 101.41 *Informal procedures for obtaining opinions on jurisdictional questions.*—Although a formal petition is necessary to obtain an advisory opinion from the Board, other avenues are available to persons seeking informal and, in most cases, speedy opinions

on jurisdictional issues. In discussion of jurisdiction questions informally with regional office personnel information and advice concerning the Board's jurisdictional standards may be obtained. Such practices are not intended to be discouraged by the rules providing for formal advisory opinions by the Board, although the opinions expressed by such personnel are not to be regarded as binding upon the Board or the general counsel.

SEC. 101.42 *Procedures for obtaining declaratory orders of the Board.*—(a) When both an unfair labor practice charge and a representation petition are pending concurrently in a regional office, appeals from a regional director's dismissals thereof do not follow the same course. Appeal from the dismissal of a charge must be made to the general counsel, while appeal from dismissal of a representation petition may be made to the Board. To obtain uniformity in disposing of such cases on jurisdictional grounds at the same stage of each proceeding, the general counsel may file a petition for a declaratory order of the Board. Such order is intended only to remove uncertainty with respect to the question of whether the Board would assert jurisdiction over the labor dispute.

(b) A petition to obtain a declaratory Board order may be filed only by the general counsel. It must be in writing and signed. It is filed with the executive secretary of the Board in Washington, D.C. No particular form is required, but the petition must be properly captioned and must contain the allegations required by section 102.106 of the Rules and Regulations. None of the information sought relates to the merits of the dispute. The petition may be withdrawn any time before the Board issues its declaratory order deciding whether it would or would not assert jurisdiction over the cases.

SEC. 101.43 *Proceedings following the filing of the petition.*—

(a) A copy of the petition is served upon all other parties.

(b) Interested persons may request intervention by a written motion to the Board. Such intervention may be granted in the discretion of the Board.

(c) All other parties may reply to the petition in writing.

(d) Briefs may be filed.

(e) After review of the record, the Board issues a declaratory order as to whether it will assert jurisdiction over the cases, but it will not render a decision on the merits at this stage of the cases.

(f) The declaratory Board order will be binding on the parties in both cases.



Text of Labor Management Relations Act, 1947, as Amended by Public Law 86-257, 1959 *

Key to Amendments

Portions of the Act which have been eliminated by the Labor-Management Reporting and Disclosure Act of 1959, Public Law 86-257, are enclosed by black brackets; provisions which have been added to the Act are in italics; and unchanged portions are shown in roman type.

[Public Law 101—80th Congress]

AN ACT

To amend the National Labor Relations Act, to provide additional facilities for the mediation of labor disputes affecting commerce, to equalize legal responsibilities of labor organizations and employers, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE AND DECLARATION OF POLICY

SECTION 1. (a) This Act may be cited as the "Labor Management Relations Act, 1947."

(b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

* Section 201 (d) and (e) of the Labor-Management Reporting and Disclosure Act of 1959 which repealed Section 9 (f), (g), and (h) of the Labor Management Relations Act, 1947, and Section 505 amending Section 302 (a), (b), and (c) of the Labor Management Relations Act, 1947, took effect upon enactment of Public Law 86-257, September 14, 1959. As to the other amendments of the Labor Management Relations Act, 1947, Section 707 of the Labor-Management Reporting and Disclosure Act provides:

The amendments made by this title shall take effect sixty days after the date of the enactment of this Act and no provision of this title shall be deemed to make an unfair labor practice, any act which is performed prior to such effective date which did not constitute an unfair labor practice prior thereto.

TITLE I—AMENDMENT OF NATIONAL LABOR RELATIONS ACT

SEC. 101. The National Labor Relations Act is hereby amended to read as follows:

FINDINGS AND POLICIES

SECTION 1. The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

DEFINITIONS

SEC. 2. When used in this Act—

(1) The term "person" includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned

Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

(4) The term "representatives" includes any individual or labor organization.

(5) The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

(8) The term "unfair labor practice" means any unfair labor practice listed in section 8.

(9) The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

(10) The term "National Labor Relations Board" means the National Labor Relations Board provided for in section 3 of this Act.

(11) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

(12) The term "professional employee" means—

(a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical

work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; or

(b) any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).

(13) In determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

NATIONAL LABOR RELATIONS BOARD

SEC. 3. (a) The National Labor Relations Board (hereinafter called the "Board") created by this Act prior to its amendment by the Labor Management Relations Act, 1947, is hereby continued as an agency of the United States, except that the Board shall consist of five instead of three members, appointed by the President by and with the advice and consent of the Senate. Of the two additional members so provided for, one shall be appointed for a term of five years and the other for a term of two years. Their successors, and the successors of the other members, shall be appointed for terms of five years each, excepting that any individual chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed. The President shall designate one member to serve as Chairman of the Board. Any member of the Board may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause.

(b) The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. *The Board is also authorized to delegate to its regional directors its powers under section 9 to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot under subsection (c) or (e) of section 9 and certify the results thereof, except that upon the filing of a request therefor with the Board by any interested person, the Board may review any action of a regional director delegated to him under this paragraph, but such a review shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director.* A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof. The Board shall have an official seal which shall be judicially noticed.

(c) The Board shall at the close of each fiscal year make a report in writing to Congress and to the President stating in detail the cases it has heard, the decisions it has rendered, the names, salaries, and duties of all employees and officers in the employ or under the supervision of the Board, and an account of all moneys it has disbursed.

(d) There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than trial examiners and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law. *In case of a vacancy in the office of the General Counsel the President is authorized to designate the officer or employee who shall act as General Counsel during such vacancy, but no person or persons so designated shall so act (1) for more than forty days when the Congress is in session unless a nomination to fill such vacancy shall have been submitted to the Senate, or (2) after the adjournment sine die of the session of the Senate in which such nomination was submitted.*

SEC. 4. (a) Each member of the Board and the General Counsel of the Board shall receive a salary of \$12,000 * a year, shall be eligible for reappointment, and shall not engage in any other business, vocation, or employment. The Board shall appoint an executive secretary, and such attorneys, examiners, and regional directors, and such other employees as it may from time to time find necessary for the proper performance of its duties. The Board may not employ any attorneys for the purpose of reviewing transcripts of hearings or preparing drafts of opinions except that any attorney employed for assignment as a legal assistant to any Board member may for such Board member review such transcripts and prepare such drafts. No trial examiner's report shall be reviewed, either before or after its publication, by any person other than a member of the Board or his legal assistant, and no trial examiner shall advise or consult with the Board with respect to exceptions taken to his findings, rulings, or recommendations. The Board may establish or utilize such regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed. Attorneys appointed under this section may, at the direction of the Board, appear for and represent the Board in any case in court. Nothing in this Act shall be construed to authorize the Board to appoint individuals for the purpose of conciliation or mediation, or for economic analysis.

(b) All of the expenses of the Board, including all necessary traveling and subsistence expenses outside the District of Columbia incurred by the members or employees of the Board under its orders, shall be allowed and paid on the presentation of itemized vouchers therefor approved by the Board or by any individual it designates for that purpose.

SEC. 5. The principal office of the Board shall be in the District of Columbia, but it may meet and exercise any or all of its powers at any other place. The Board may, by one or more of its members or by such agents or agencies as it may designate, prosecute any inquiry necessary to its functions in any part of the United States. A member who participates in such an inquiry shall not be disqualified from subsequently participating in a decision of the Board in the same case.

SEC. 6. The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of this Act.

*Pursuant to Public Law 854, 84th Congress, 2d Session, Title I, approved July 31, 1956, the salary of the Chairman of the Board shall be \$20,500 per year and the salaries of the General Counsel and each Board member shall be \$20,000 per year.

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made [and has at the time the agreement was made or within the preceding twelve months received from the Board a notice of compliance with section 9 (f), (g), (h)], and (ii) unless following an election held as provided in section 9 (e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: Provided, That this paragraph shall not impair the right of a

labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9 (a);

(4) (i) to engage in, or to induce or encourage *[the employees of any employer]* any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a *[concerted]* refusal in the course of *[their]* his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services~~;~~; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or *[any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person]* to enter into any agreement which is prohibited by section 8 (e);

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9~~;~~; *Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;*

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

Provided, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act~~;~~; Provided further, That for the purposes of this paragraph (4) only, nothing contained in

such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

(5) to require of employees covered by an agreement authorized under subsection (a) (3) the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount which the Board finds excessive or discriminatory under all the circumstances. In making such a finding, the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected; [and]

(6) to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed[.]; and

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

(A) where the employer has lawfully recognized in accordance with this Act any other labor organization and a question concerning representation may not appropriately be raised under section 9 (c) of this Act,

(B) where within the preceding twelve months a valid election under section 9 (c) of this Act has been conducted, or

(C) where such picketing has been conducted without a petition under section 9 (c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: Provided, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 9 (c) (1) or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: Provided further, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this section 8 (b).

(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: Provided, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9 (a), and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

(e) *It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: Provided, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: Provided further, That for the purposes of this subsection (e) and section 8 (b) (4)*

(B) the terms "any employer", "any person engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: Provided further, That nothing in this Act shall prohibit the enforcement of any agreement which is within the foregoing exception.

(f) It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 9 of this Act prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: Provided, That nothing in this subsection shall set aside the final proviso to section 8 (a) (3) of this Act: Provided further, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 9 (c) or 9 (e).*

REPRESENTATIVES AND ELECTIONS

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: Provided, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes

* Section 8 (f) is inserted in the Act by subsection (a) of Section 705 of Public Law 86-257. Section 705 (b) provides:

Nothing contained in the amendment made by subsection (a) shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9 (a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9 (a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9 (a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 10 (c).

(3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. Employees **[on]** engaged in an economic strike who are not entitled to reinstatement shall **[not]** be eligible to vote~~].~~ *under such regulations as the Board shall find are consistent with the purposes and provisions of this Act in any election conducted within twelve months after the commencement of the strike.* In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) the extent to which the employees have organized shall not be controlling.

(d) Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

(e) (1) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 8 (a) (3), of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employer.

(2) No election shall be conducted pursuant to this subsection in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held.

[(f) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless such labor organization and any national or international labor organization of which such labor organization is an affiliate or constituent unit (A) shall have prior thereto filed with the Secretary of Labor copies of its constitution and bylaws and a report, in such form as the Secretary may prescribe, showing—

(1) the name of such labor organization and the address of its principal place of business;

(2) the names, titles, and compensation and allowances of its three principal officers and of any of its other officers or agents whose aggregate compensation and allowances for the preceding year exceeded \$5,000, and the amount of the compensation and allowances paid to each such officer or agent during such year;

(3) the manner in which the officers and agents referred to in clause (2) were elected, appointed, or otherwise selected;

(4) the initiation fee or fees which new members are required to pay on becoming members of such labor organization;

(5) the regular dues or fees which members are required to pay in order to remain members in good standing of such labor organization;

(6) a detailed statement of, or reference to provisions of its constitution and bylaws showing the procedure followed with respect to, (a) qualification for or restrictions on membership, (b) election of officers and stewards, (c) calling of regular and special meetings, (d) levying of assessments, (e) imposition of fines, (f) authorization for bargaining demands, (g) ratification of contract terms, (h) authorization for strikes, (i) authorization for disbursement of union funds, (j) audit of union financial transactions, (k) participation in insurance or other benefit plans, and (l) expulsion of members and the grounds therefor;

and (B) can show that prior thereto it has—

(1) filed with the Secretary of Labor, in such form as the Secretary may prescribe, a report showing all of (a) its receipts of any kind and the sources of such receipts, (b) its total assets and liabilities as of the end of its last fiscal year, (c) the disbursements made by it during such fiscal year, including the purposes for which made; and

(2) furnished to all of the members of such labor organization copies of the financial report required by paragraph (1) hereof to be filed with the Secretary of Labor.】

【(g) It shall be the obligation of all labor organizations to file annually with the Secretary of Labor, in such form as the Secretary of Labor may prescribe, reports bringing up to date the information required to be supplied in the initial filing by subsection (f) (A) of this section, and to file with the Secretary of Labor and furnish to its members annually financial reports in the form and manner prescribed in subsection (f) (B). No labor organization shall be eligible for certification under this section as the representative of any employees, and no complaint shall issue under section 10 with respect to a charge filed by a labor organization unless it can show that it and any national or international labor organization of which it is an affiliate or constituent unit has complied with its obligation under this subsection.】

【(h) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35 A of the Criminal Code shall be applicable in respect to such affidavits.】

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said

complaint: Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U. S. C., title 28, secs. 723-B, 723-C).

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: Provided, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: And provided further, That in determining whether a complaint shall issue alleging a violation of section 8 (a) (1) or section 8 (a) (2), and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

(d) Until the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner

as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by

substantial evidence on the record considered as a whole shall in like manner be conclusive.

(g) The commencement of proceedings under subsection (e) or (f) of this section shall not, unless specifically ordered by the court, operate as a stay of the Board's order.

(h) When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part an order of the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes," approved March 23, 1932 (U. S. C., Supp. VII, title 29, secs. 101-115).

(i) Petitions filed under this Act shall be heard expeditiously, and if possible within ten days after they have been docketed.

(j) The Board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in an unfair labor practice, to petition any district court of the United States (including the District Court of the United States for the District of Columbia), within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

(k) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (D) of section 8 (b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

(l) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (A), (B), or (C) of section 8 (b), or section 8 (e) or section 8 (b) (7), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any district court of the United States (including the District Court of the United States for the District of Columbia) within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: Provided further, That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period. *Provided further, That*

such officer or regional attorney shall not apply for any restraining order under section 8 (b) (7) if a charge against the employer under section 8 (a) (2) has been filed and after the preliminary investigation, he has reasonable cause to believe that such charge is true and that a complaint should issue. Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: Provided further, That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organization a party to the suit. In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 8 (b) (4) (D).

(m) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of subsection (a) (3) or (b) (2) of section 8, such charge shall be given priority over all other cases except cases of like character in the office where it is filed or to which it is referred and cases given priority under subsection (l).

INVESTIGATORY POWERS

SEC. 11. For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by section 9 and section 10—

(1) The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpoenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. Within five days after the service of a subpoena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, and the Board shall revoke, such subpoena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpoena does not describe with sufficient particularity the evidence whose production is required. Any member of the Board, or any agent or agency designated by the Board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing.

(2) In case of contumacy or refusal to obey a subpoena issued to any person, any district court of the United States or the United States courts of any Territory or possession, or the District Court of the United States for the District of Columbia, within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its member, agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question; and

any failure to obey such order of the court may be punished by said court as a contempt thereof.

(3) No person shall be excused from attending and testifying or from producing books, records, correspondence, documents, or other evidence in obedience to the subpoena of the Board, on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

(4) Complaints, orders, and other process and papers of the Board, its member, agent, or agency, may be served either personally or by registered mail or by telegraph or by leaving a copy thereof at the principal office or place of business of the person required to be served. The verified return by the individual so serving the same setting forth the manner of such service shall be proof of the same, and the return post office receipt or telegraph receipt therefor when registered and mailed or telegraphed as aforesaid shall be proof of service of the same. Witnesses summoned before the Board, its member, agent, or agency, shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

(5) All process of any court to which application may be made under this Act may be served in the judicial district wherein the defendant or other person required to be served resides or may be found.

(6) The several departments and agencies of the Government, when directed by the President, shall furnish the Board, upon its request, all records, papers, and information in their possession relating to any matter before the Board.

SEC. 12. Any person who shall willfully resist, prevent, impede, or interfere with any member of the Board or any of its agents or agencies in the performance of duties pursuant to this Act shall be punished by a fine of not more than \$5,000 or by imprisonment for not more than one year, or both.

LIMITATIONS

SEC. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

SEC. 14. (a) Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.

(b) Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

(c) (1) *The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to the Administrative Procedure Act, decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not suffi-*

ciently substantial to warrant the exercise of its jurisdiction: Provided, That the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959.

(2) Nothing in this Act shall be deemed to prevent or bar any agency or the courts of any State or Territory (including the Commonwealth of Puerto Rico, Guam, and the Virgin Islands), from assuming and asserting jurisdiction over labor disputes over which the Board declines, pursuant to paragraph (1) of this subsection, to assert jurisdiction.

SEC. 15. Wherever the application of the provisions of section 272 of chapter 10 of the Act entitled "An Act to establish a uniform system of bankruptcy throughout the United States," approved July 1, 1898, and Acts amendatory thereof and supplementary thereto (U. S. C., title 11, sec. 672), conflicts with the application of the provisions of this Act, this Act shall prevail: Provided, That in any situation where the provisions of this Act cannot be validly enforced, the provisions of such other Acts shall remain in full force and effect.

SEC. 16. If any provision of this Act, or the application of such provision to any person or circumstances, shall be held invalid, the remainder of this Act, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

SEC. 17. This Act may be cited as the "National Labor Relations Act."

SEC. 18. No petition entertained, no investigation made, no election held, and no certification issued by the National Labor Relations Board, under any of the provisions of section 9 of the National Labor Relations Act, as amended, shall be invalid by reason of the failure of the Congress of Industrial Organizations to have complied with the requirements of section 9 (f), (g), or (h) of the aforesaid Act prior to December 22, 1949, or by reason of the failure of the American Federation of Labor to have complied with the provisions of section 9 (f), (g), or (h) of the aforesaid Act prior to November 7, 1947: Provided, That no liability shall be imposed under any provision of this Act upon any person for failure to honor any election or certificate referred to above, prior to the effective date of this amendment: Provided, however, That this proviso shall not have the effect of setting aside or in any way affecting judgments or decrees heretofore entered under section 10 (e) or (f) and which have become final.

EFFECTIVE DATE OF CERTAIN CHANGES *

SEC. 102. No provision of this title shall be deemed to make an unfair labor practice any act which was performed prior to the date of the enactment of this Act which did not constitute an unfair labor practice prior thereto, and the provisions of section 8 (a) (3) and section 8 (b) (2) of the National Labor Relations Act as amended by this title shall not make an unfair labor practice the performance of any obligation under a collective-bargaining agreement entered into prior to the date of the enactment of this Act, or (in the case of an agreement for a period of not more than one year) entered into on or after such date of enactment, but prior to the effective date of this title, if the performance of such obligation would not have constituted an unfair labor practice under section 8 (3) of the National Labor Relations Act prior to the effective date of this title, unless such agreement was renewed or extended subsequent thereto.

SEC. 103. No provisions of this title shall affect any certification of representatives or any determination as to the appropriate collective-bargaining unit,

* The effective date referred to in Sections 102, 103, and 104 is August 22, 1947. For effective dates of 1959 amendments, see footnote on page one of this text.

which was made under section 9 of the National Labor Relations Act prior to the effective date of this title until one year after the date of such certification or if, in respect of any such certification, a collective-bargaining contract was entered into prior to the effective date of this title, until the end of the contract period or until one year after such date, whichever first occurs.

SEC. 104. The amendments made by this title shall take effect sixty days after the date of the enactment of this Act, except that the authority of the President to appoint certain officers conferred upon him by section 3 of the National Labor Relations Act as amended by this title may be exercised forthwith.

TITLE II—CONCILIATION OF LABOR DISPUTES IN INDUSTRIES AFFECTING COMMERCE; NATIONAL EMERGENCIES

SEC. 201. That it is the policy of the United States that—

(a) sound and stable industrial peace and the advancement of the general welfare, health, and safety of the Nation and of the best interest of employers and employees can most satisfactorily be secured by the settlement of issues between employers and employees through the processes of conference and collective bargaining between employers and the representatives of their employees;

(b) the settlement of issues between employers and employees through collective bargaining may be advanced by making available full and adequate governmental facilities for conciliation, mediation, and voluntary arbitration to aid and encourage employers and the representatives of their employees to reach and maintain agreements concerning rates of pay, hours, and working conditions, and to make all reasonable efforts to settle their differences by mutual agreement reached through conferences and collective bargaining or by such methods as may be provided for in any applicable agreement for the settlement of disputes; and

(c) certain controversies which arise between parties to collective-bargaining agreements may be avoided or minimized by making available full and adequate governmental facilities for furnishing assistance to employers and the representatives of their employees in formulating for inclusion within such agreements provision for adequate notice of any proposed changes in the terms of such agreements, for the final adjustment of grievances or questions regarding the application or interpretation of such agreements, and other provisions designed to prevent the subsequent arising of such controversies.

SEC. 202. (a) There is hereby created an independent agency to be known as the Federal Mediation and Conciliation Service (herein referred to as the "Service," except that for sixty days after the date of the enactment of this Act such term shall refer to the Conciliation Service of the Department of Labor). The Service shall be under the direction of a Federal Mediation and Conciliation Director (hereinafter referred to as the "Director"), who shall be appointed by the President by and with the advice and consent of the Senate. The Director shall receive compensation at the rate of \$12,000* per annum. The Director shall not engage in any other business, vocation, or employment.

(b) The Director is authorized, subject to the civil-service laws, to appoint such clerical and other personnel as may be necessary for the execution of the functions of the Service, and shall fix their compensation in accordance with the Classification Act of 1923, as amended, and may, without regard to the provisions of the civil-

*Pursuant to Public Law 854, 84th Congress, 2d Session, Title I, approved July 31, 1956, the salary of the Director shall be \$20,500 per year.

service laws and the Classification Act of 1923, as amended, appoint and fix the compensation of such conciliators and mediators as may be necessary to carry out the functions of the Service. The Director is authorized to make such expenditures for supplies, facilities, and services as he deems necessary. Such expenditures shall be allowed and paid upon presentation of itemized vouchers therefor approved by the Director or by any employee designated by him for that purpose.

(c) The principal office of the Service shall be in the District of Columbia, but the Director may establish regional offices convenient to localities in which labor controversies are likely to arise. The Director may by order, subject to revocation at any time, delegate any authority and discretion conferred upon him by this Act to any regional director, or other officer or employee of the Service. The Director may establish suitable procedures for cooperation with State and local mediation agencies. The Director shall make an annual report in writing to Congress at the end of the fiscal year.

(d) All mediation and conciliation functions of the Secretary of Labor or the United States Conciliation Service under section 8 of the Act entitled "An Act to create a Department of Labor," approved March 4, 1913 (U. S. C., title 29, sec. 51), and all functions of the United States Conciliation Service under any other law are hereby transferred to the Federal Mediation and Conciliation Service, together with the personnel and records of the United States Conciliation Service. Such transfer shall take effect upon the sixtieth day after the date of enactment of this Act. Such transfer shall not affect any proceedings pending before the United States Conciliation Service or any certification, order, rule, or regulation theretofore made by it or by the Secretary of Labor. The Director and the Service shall not be subject in any way to the jurisdiction or authority of the Secretary of Labor or any official or division of the Department of Labor.

FUNCTIONS OF THE SERVICE

SEC. 203. (a) It shall be the duty of the Service, in order to prevent or minimize interruptions of the free flow of commerce growing out of labor disputes, to assist parties to labor disputes in industries affecting commerce to settle such disputes through conciliation and mediation.

(b) The Service may proffer its services in any labor dispute in any industry affecting commerce, either upon its own motion or upon the request of one or more of the parties to the dispute, whenever in its judgment such dispute threatens to cause a substantial interruption of commerce. The Director and the Service are directed to avoid attempting to mediate disputes which would have only a minor effect on interstate commerce if State or other conciliation services are available to the parties. Whenever the Service does proffer its services in any dispute, it shall be the duty of the Service promptly to put itself in communication with the parties and to use its best efforts, by mediation and conciliation, to bring them to agreement.

(c) If the Director is not able to bring the parties to agreement by conciliation within a reasonable time, he shall seek to induce the parties voluntarily to seek other means of settling the dispute without resort to strike, lock-out, or other coercion, including submission to the employees in the bargaining unit of the employer's last offer of settlement for approval or rejection in a secret ballot. The failure or refusal of either party to agree to any procedure suggested by the Director shall not be deemed a violation of any duty or obligation imposed by this Act.

(d) Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over

the application or interpretation of an existing collective-bargaining agreement. The Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases.

SEC. 204. (a) In order to prevent or minimize interruptions of the free flow of commerce growing out of labor disputes, employers and employees and their representatives, in any industry affecting commerce, shall—

(1) exert every reasonable effort to make and maintain agreements concerning rates of pay, hours, and working conditions, including provision for adequate notice of any proposed change in the terms of such agreements;

(2) whenever a dispute arises over the terms or application of a collective-bargaining agreement and a conference is requested by a party or prospective party thereto, arrange promptly for such a conference to be held and endeavor in such conference to settle such dispute expeditiously; and

(3) in case such dispute is not settled by conference, participate fully and promptly in such meetings as may be undertaken by the Service under this Act for the purpose of aiding in a settlement of the dispute.

SEC. 205. (a) There is hereby created a National Labor-Management Panel which shall be composed of twelve members appointed by the President, six of whom shall be selected from among persons outstanding in the field of management and six of whom shall be selected from among persons outstanding in the field of labor. Each member shall hold office for a term of three years, except that any member appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed for the remainder of such term, and the terms of office of the members first taking office shall expire, as designated by the President at the time of appointment, four at the end of the first year, four at the end of the second year, and four at the end of the third year after the date of appointment. Members of the panel, when serving on business of the panel, shall be paid compensation at the rate of \$25 per day, and shall also be entitled to receive an allowance for actual and necessary travel and subsistence expenses while so serving away from their places of residence.

(b) It shall be the duty of the panel, at the request of the Director, to advise in the avoidance of industrial controversies and the manner in which mediation and voluntary adjustment shall be administered, particularly with reference to controversies affecting the general welfare of the country.

NATIONAL EMERGENCIES

SEC. 206. Whenever in the opinion of the President of the United States, a threatened or actual strike or lock-out affecting an entire industry or a substantial part thereof engaged in trade, commerce, transportation, transmission, or communication among the several States or with foreign nations, or engaged in the production of goods for commerce, will, if permitted to occur or to continue, imperil the national health or safety, he may appoint a board of inquiry to inquire into the issues involved in the dispute and to make a written report to him within such time as he shall prescribe. Such report shall include a statement of the facts with respect to the dispute, including each party's statement of its position but shall not contain any recommendations. The President shall file a copy of such report with the Service and shall make its contents available to the public.

SEC. 207. (a) A board of inquiry shall be composed of a chairman and such other members as the President shall determine, and shall have power to sit and act in any place within the United States and to conduct such hearings either in

public or in private, as it may deem necessary or proper, to ascertain the facts with respect to the causes and circumstances of the dispute.

(b) Members of a board of inquiry shall receive compensation at the rate of \$50 for each day actually spent by them in the work of the board, together with necessary travel and subsistence expenses.

(c) For the purpose of any hearing or inquiry conducted by any board appointed under this title, the provisions of sections 9 and 10 (relating to the attendance of witnesses and the production of books, papers, and documents) of the Federal Trade Commission Act of September 16, 1914, as amended (U. S. C. 19, title 15, secs. 49 and 50, as amended), are hereby made applicable to the powers and duties of such board.

SEC. 208. (a) Upon receiving a report from a board of inquiry the President may direct the Attorney General to petition any district court of the United States having jurisdiction of the parties to enjoin such strike or lock-out or the continuing thereof, and if the court finds that such threatened or actual strike or lock-out—

(i) affects an entire industry or a substantial part thereof engaged in trade, commerce, transportation, transmission, or communication among the several States or with foreign nations, or engaged in the production of goods for commerce; and

(ii) if permitted to occur or to continue, will imperil the national health or safety, it shall have jurisdiction to enjoin any such strike or lock-out, or the continuing thereof, and to make such other orders as may be appropriate.

(b) In any case, the provisions of the Act of March 23, 1932, entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes," shall not be applicable.

(c) The order or orders of the court shall be subject to review by the appropriate circuit court of appeals and by the Supreme Court upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 29, secs. 346 and 347).

SEC. 209. (a) Whenever a district court has issued an order under section 208 enjoining acts or practices which imperil or threaten to imperil the national health or safety, it shall be the duty of the parties to the labor dispute giving rise to such order to make every effort to adjust and settle their differences, with the assistance of the Service created by this Act. Neither party shall be under any duty to accept, in whole or in part, any proposal of settlement made by the Service.

(b) Upon the issuance of such order, the President shall reconvene the board of inquiry which has previously reported with respect to the dispute. At the end of a sixty-day period (unless the dispute has been settled by that time), the board of inquiry shall report to the President the current position of the parties and the efforts which has been made for settlement, and shall include a statement by each party of its position and a statement of the employer's last offer of settlement. The President shall make such report available to the public. The National Labor Relations Board, within the succeeding fifteen days, shall take a secret ballot of the employees of each employer involved in the dispute on the question of whether they wish to accept the final offer of settlement made by their employer as stated by him and shall certify the results thereof to the Attorney General within five days thereafter.

SEC. 210. Upon the certification of the results of such ballot or upon a settlement being reached, whichever happens sooner, the Attorney General shall move the

court to discharge the injunction, which motion shall then be granted and the injunction discharged. When such motion is granted, the President shall submit to the Congress a full and comprehensive report of the proceedings, including the findings of the board of inquiry and the ballot taken by the National Labor Relations Board, together with such recommendations as he may see fit to make for consideration and appropriate action.

COMPILATION OF COLLECTIVE-BARGAINING AGREEMENTS, ETC.

SEC. 211. (a) For the guidance and information of interested representatives of employers, employees, and the general public, the Bureau of Labor Statistics of the Department of Labor shall maintain a file of copies of all available collective-bargaining agreements and other available agreements and actions thereunder settling or adjusting labor disputes. Such file shall be open to inspection under appropriate conditions prescribed by the Secretary of Labor, except that no specific information submitted in confidence shall be disclosed.

(b) The Bureau of Labor Statistics in the Department of Labor is authorized to furnish upon request of the Service, or employers, employees, or their representatives, all available data and factual information which may aid in the settlement of any labor dispute, except that no specific information submitted in confidence shall be disclosed.

EXEMPTION OF RAILWAY LABOR ACT

SEC. 212. The provisions of this title shall not be applicable with respect to any matter which is subject to the provisions of the Railway Labor Act, as amended from time to time.

TITLE III

SUITS BY AND AGAINST LABOR ORGANIZATIONS

SEC. 301. (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) The service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for

his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

RESTRICTIONS ON PAYMENTS TO EMPLOYEE REPRESENTATIVES

SEC. 302. (a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or [to] agree to pay, lend, or deliver, any money or other thing of value—

(1) to any representative of any of his employees who are employed in an industry affecting commerce[.]; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce;
or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing;
or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

(b) (1) It shall be unlawful for any [representative of any employees who are employed in an industry affecting commerce] person to request, demand, receive, or accept, or [to] agree to receive or accept, [from the employer of such employees] any payment, loan, or delivery of any money or other thing of value[.] prohibited by subsection (a).

(2) It shall be unlawful for any labor organization, or for any person acting as an officer, agent, representative, or employee of such labor organization, to demand or accept from the operator of any motor vehicle (as defined in part II of the Interstate Commerce Act) employed in the transportation of property in commerce, or the employer of any such operator, any money or other thing of value payable to such organization or to an officer, agent, representative or employee thereof as a fee or charge for the unloading, or in connection with the unloading, of the cargo of such vehicle: Provided, That nothing in this paragraph shall be construed to make unlawful any payment by an employer to any of his employees as compensation for their services as employees.

(c) The provisions of this section shall not be applicable (1) [with] in respect to any money or other thing of value payable by an employer to any of his employees whose established duties include acting openly for such employer in matters of labor relations or personnel administration or to any representative of his employees, or to any officer or employee of a labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service[s] as an employee of such employer; (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement, or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress; (3) with respect to the sale or purchase of an article or com-

modity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: Provided, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; **[or]** (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): Provided, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of **[the]** employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities**[.]**; or (6) *with respect to money or other thing of value paid by any employer to a trust fund established by such representative for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training programs: Provided, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds.*

(d) Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than \$10,000 or to imprisonment for not more than one year, or both.

(e) The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 17 (relating to notice to opposite party) of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914, as amended (U. S. C., title 28, sec. 381), to restrain violations of this section, without regard to the provisions of sections 6 and 20 of such Act of October 15, 1914, as amended (U. S. C., title 15, sec. 17, and title 29, sec. 52), and the provisions of the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes," approved March 23, 1932 (U. S. C., title 29, secs. 101-115).

(f) This section shall not apply to any contract in force on the date of enactment of this Act, until the expiration of such contract, or until July 1, 1948, whichever first occurs.

(g) Compliance with the restrictions contained in subsection (c) (5) (B) upon contributions to trust funds, otherwise lawful, shall not be applicable to contributions to such trust funds established by collective agreement prior to January 1, 1946, nor shall subsection (c) (5) (A) be construed as prohibiting contributions to such trust funds if prior to January 1, 1947, such funds contained provisions for pooled vacation benefits.

BOYCOTTS AND OTHER UNLAWFUL COMBINATIONS

SEC. 303. (a) It shall be unlawful, for the purpose[s] of this section only, in an industry or activity affecting commerce, for any labor organization to engage in[, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is—]

[(1) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;]

[(2) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9 of the National Labor Relations Act;]

[(3) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9 of the National Labor Relations Act;]

[(4) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class unless such employer is failing to conform to an order or certification of the National Labor Relations Board determining the bargaining representative for employees performing such work. Nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under the National Labor Relations Act.]

any activity or conduct defined as an unfair labor practice in section 8 (b) (4) of the National Labor Relations Act, as amended.

(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefor in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

RESTRICTION ON POLITICAL CONTRIBUTIONS

SEC. 304. Section 313 of the Federal Corrupt Practices Act, 1925 (U. S. C., 1940 edition, title 2, sec. 251; Supp. V, title 50, App., sec. 1509), as amended, is amended to read as follows:

SEC. 313. It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization to make a contribution or expenditure in connection with any election at which Presidential and Vice Presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person to accept or receive any contribution prohibited by this section. Every corporation or labor organization which makes any contribution or expenditure in violation of this section shall be fined not more than \$5,000; and every officer or director of any corporation, or officer of any labor organization, who consents to any contribution or expenditure by the corporation or labor organization, as the case may be, in violation of this section shall be fined not more than \$1,000 or imprisoned for not more than one year, or both. For the purposes of this section "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

STRIKES BY GOVERNMENT EMPLOYEES

SEC. 305. It shall be unlawful for any individual employed by the United States or any agency thereof including wholly owned Government corporations to participate in any strike. Any individual employed by the United States or by any such agency who strikes shall be discharged immediately from his employment, and shall forfeit his civil-service status, if any, and shall not be eligible for reemployment for three years by the United States or any such agency.

TITLE IV

CREATION OF JOINT COMMITTEE TO STUDY AND REPORT ON BASIC PROBLEMS AFFECTING FRIENDLY LABOR RELATIONS AND PRODUCTIVITY

TITLE V

DEFINITIONS

SEC. 501. When used in this Act—

(1) The term "industry affecting commerce" means any industry or activity in commerce or in which a labor dispute would burden or obstruct commerce or tend to burden or obstruct commerce or the free flow of commerce.

(2) The term "strike" includes any strike or other concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective-bargaining agreement) and any concerted slow-down or other concerted interruption of operations by employees.

(3) The terms "commerce," "labor disputes," "employer," "employee," "labor organization," "representative," "person," and "supervisor" shall have the same meaning as when used in the National Labor Relations Act as amended by this Act.

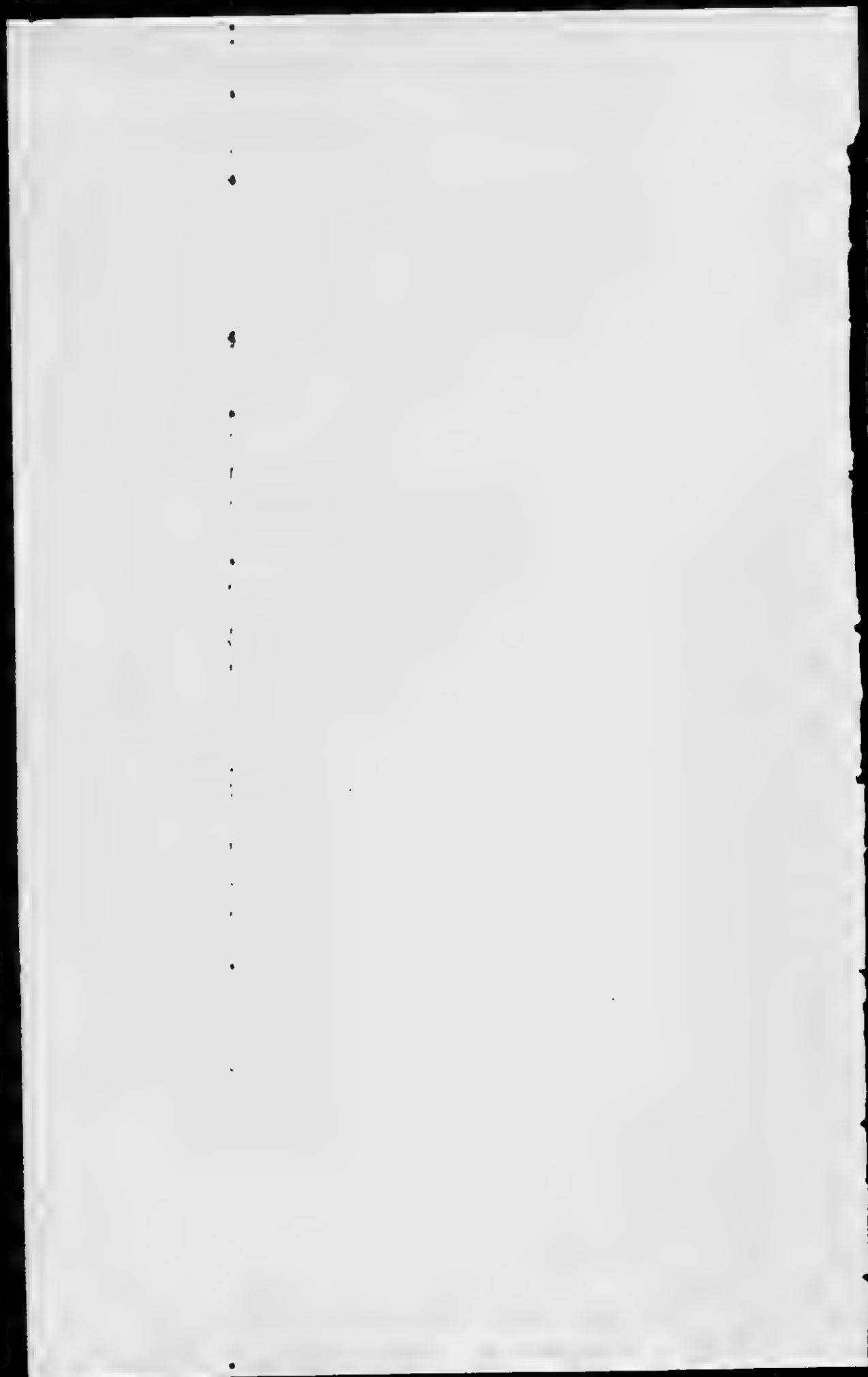
SAVING PROVISION

SEC. 502. Nothing in this Act shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this Act be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent; nor shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this Act.

SEPARABILITY

SEC. 503. If any provision of this Act, or the application of such provision to any person or circumstance, shall be held invalid, the remainder of this Act, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.





**AMENDMENTS TO RULES AND REGULATIONS AND STATEMENTS OF PROCEDURE,
Series 8, as amended**

Effective September 3, 1963, except that section 102.46 shall apply only to those cases in which a trial examiner's decision issues on or after September 3, 1963.

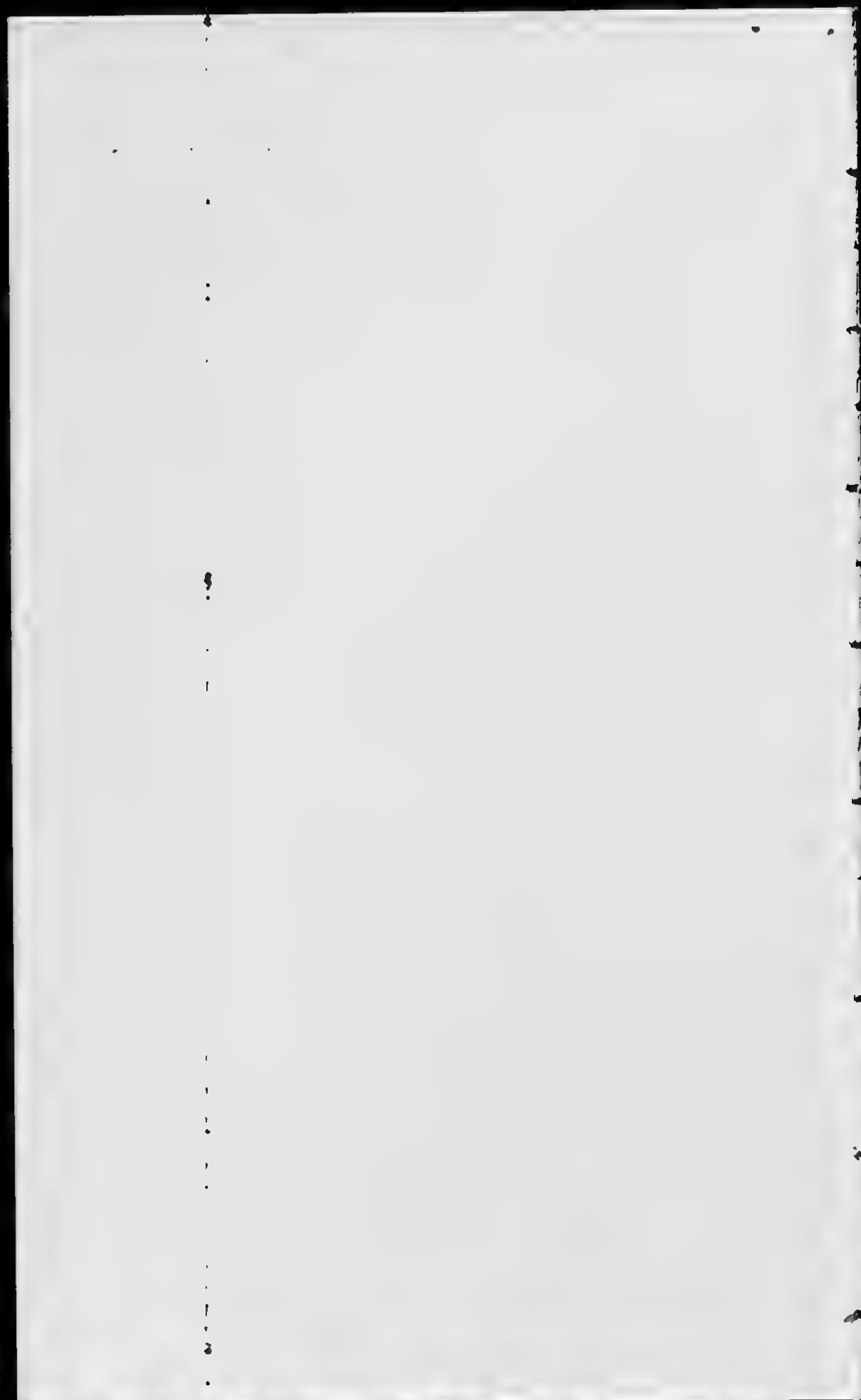
Deletions are bracketed and additions are underlined; double underlining designates new heading.

Substitute the following sections in the Rules and Regulations for the present ones:

Subpart B: 102.15
 102.25
 102.27
 102.35 (h), (i), (k), present (k) changed to (l)
 102.36
 102.37
 102.45 (a), (b)
 102.46 (a), (b), (c), (d), (e), (f), (g), (h), (i),
 (j) (present (b) changed to (h), (c) and (d)
 changed to (i), and (e) to (j))
 102.48
Subpart C: 102.69(e)
Subpart I: 102.111(a)
Subpart K: 102.118
Subpart L: Footnote added

Substitute the following sections in the Statements of Procedure for the present ones:

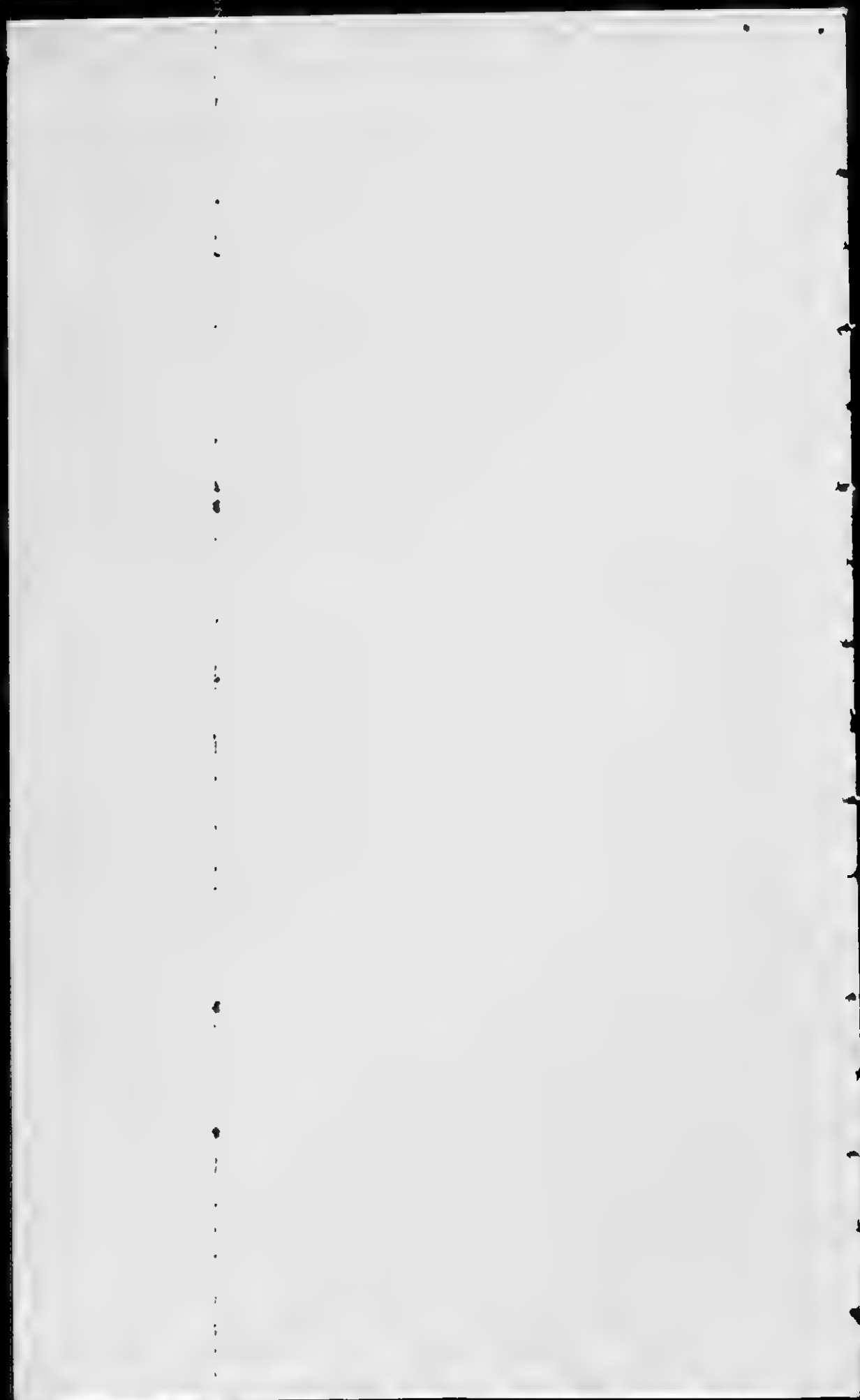
Subpart B: 101.11 (a), (b)
 101.12 (a), (b), (c)



In the table of contents, the following headings have been changed:

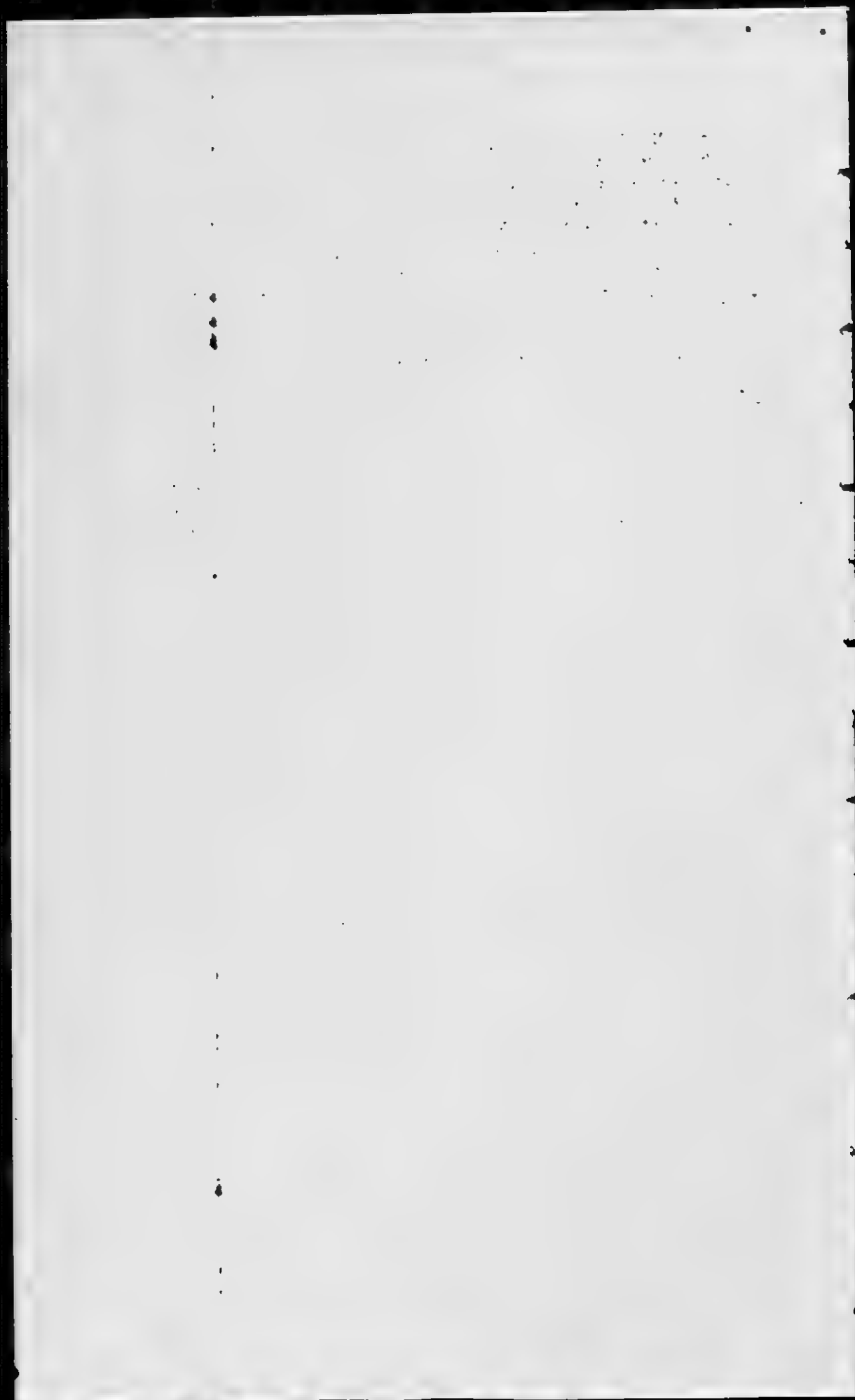
TRIAL EXAMINER'S DECISION AND TRANSFER OF CASE TO THE BOARD

- 102.45 Trial examiner's decision; contents; service; transfer of the case to the Board; contents of record in case.
- 102.46 Exceptions, cross-exceptions, briefs, answering briefs; time for filing; where to file; service on parties; extension of time; effect of failure to include matter in exceptions; oral arguments.
- 102.48 Action of Board upon expiration of time to file exceptions to trial examiner's decision; decisions by the Board; extraordinary postdecisional motions.
- 102.81 Review by the general counsel; resumption of proceedings upon charge held during pendency of petition.
- 101.11 Trial examiner's decision.



Sec. 102.15 When and by whom issued; contents; service.--After a charge has been filed, if it appears to the regional director that formal proceedings in respect thereto should be instituted, he shall issue and cause to be served upon all the other parties a formal complaint in the name of the Board stating the unfair labor practices and containing a notice of hearing before a trial examiner at a place therein fixed and at a time not less than 10 days after the service of the complaint. The complaint shall contain (1) a clear and concise statement of the facts upon which assertion of jurisdiction by the Board is predicated, and (2) a clear and concise description of the acts which are claimed to constitute unfair labor practices, including, where known, the approximate dates and places of such acts and the names of respondent's agents or other representatives by whom committed.

Sec. 102.25 Ruling on motions; where to file motions after hearing and before transfer of case to Board.--The trial examiner designated to conduct the hearing shall rule upon all motions (except as provided in sections 102.16, 102.22, 102.29, and 102.47). The trial examiner may, before the hearing, rule on motions filed prior to the hearing, and shall cause copies of his ruling to be served upon all the parties. All motions filed subsequent to the hearing, but before the transfer of the case to the Board pursuant to section 102.45, shall be filed with the trial examiner, care of the chief trial examiner in Washington, D.C., or associate chief trial examiner, San Francisco, California, as the case may be, and a copy thereof shall be served on each of the parties. Rulings by the trial examiner on motions, and any orders in connection therewith, if announced at the hearing, shall be stated orally on the record; in all other cases such rulings and orders shall be issued in writing. The trial examiner shall cause a copy of the same to be served upon each of the other parties, or shall make his ruling in the intermediate report his decision. Whenever the trial examiner has reserved his ruling on any motion, and the proceeding is thereafter transferred to and continued before the Board pursuant to section 102.50, the Board shall rule on such motion.



Sec. 102.27 Review of granting of motion to dismiss entire complaint; reopening of record.--If any motion in the nature of a motion to dismiss the complaint in its entirety is granted by the trial examiner before filing his /intermediate report/ decision, any party may obtain a review of such action by filing a request therefor with the Board in Washington, D.C., stating the grounds for review and immediately on such filing shall serve a copy thereof on the regional director and the other parties. Unless such request for review is filed within 10 days from the date of the order of dismissal, the case shall be closed.

Sec. 102.35 Duties and powers of trial examiners.--

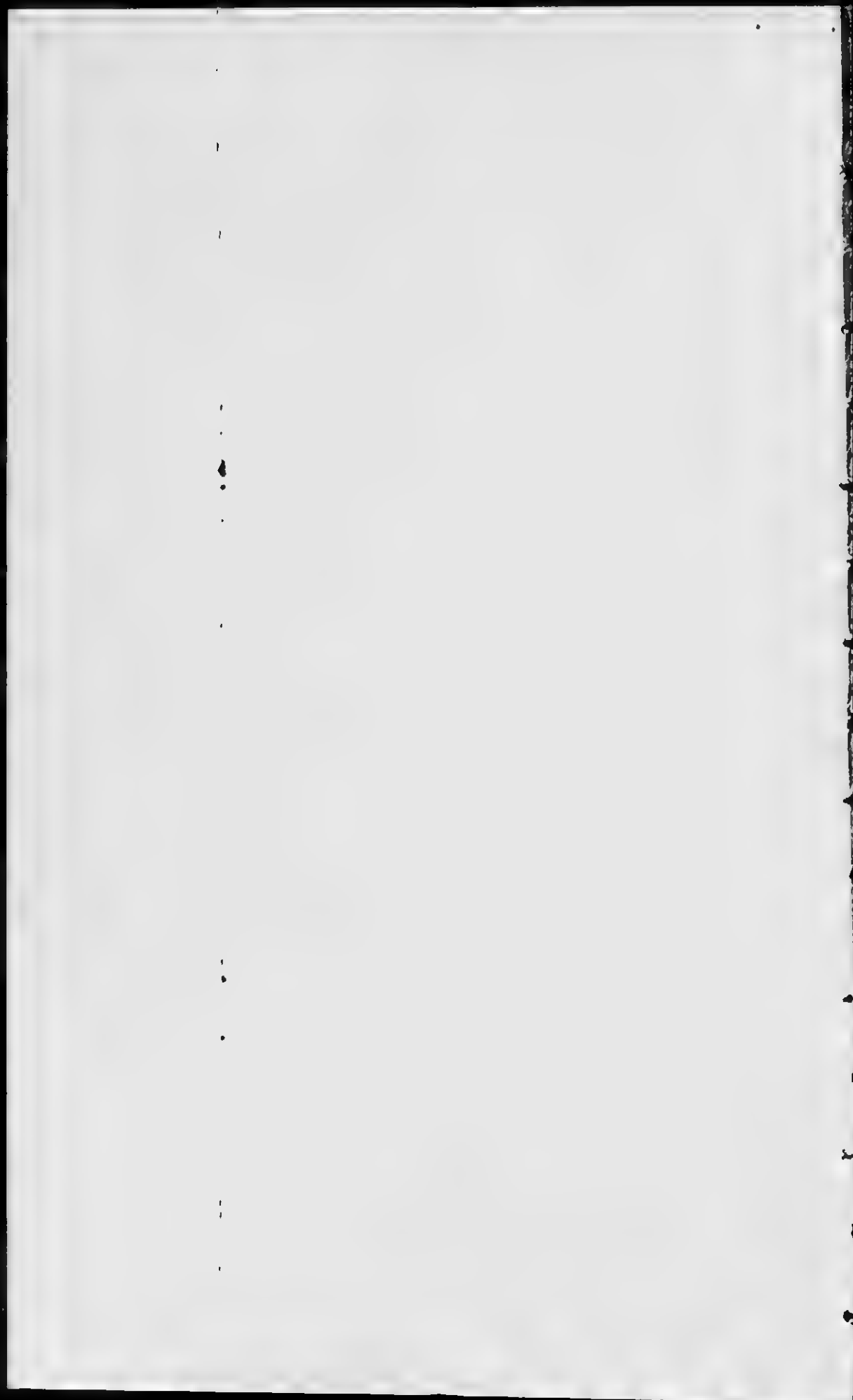
(h) To dispose of procedural requests or similar matters, including motions referred to the trial examiner by the regional director and motions to amend pleadings; also to dismiss complaints or portions thereof, and to order hearings reopened or, upon motion, consolidated prior to issuance of /intermediate reports (recommended decisions)/ trial examiner decisions;

(i) To make and file /intermediate reports/ decisions in conformity with section 8 of the Administrative Procedure Act;

(k) To request the parties at any time during the hearing to state their respective positions concerning any issue in the case or theory in support thereof;

/ (k) / (1) To take any other action necessary under the foregoing and authorized by the published Rules and Regulations of the Board.

Sec. 102.36 Unavailability of trial examiners.--In the event the trial examiner designated to conduct the hearing becomes unavailable to the Board after the hearing has been concluded and before the filing of his /intermediate report/ decision, the Board may transfer the case to itself for purposes of further hearing or issuance of /an intermediate report or both/ a proposed decision and order on the record as made, or both, or may request the chief trial examiner in Washington, D.C., or associate chief trial examiner, San Francisco, California, as the case may be, to designate another trial examiner for such purposes.



Sec. 102.37 Disqualification of trial examiners.--A trial examiner may withdraw from a proceeding whenever he deems himself disqualified. Any party may request the trial examiner, at any time following his designation by the chief trial examiner or associate chief trial examiner and before filing of his /intermediate report/ decision, to withdraw on ground of personal bias or disqualification, by filing with him promptly upon the discovery of the alleged facts a timely affidavit setting forth in detail the matters alleged to constitute grounds for disqualification. If, in the opinion of the trial examiner, such affidavit is filed with due diligence and is sufficient on its face, he shall forthwith disqualify himself and withdraw from the proceeding. If the trial examiner does not disqualify himself and withdraw from the proceeding, he shall so rule upon the record, stating the grounds for his ruling and proceed with the hearing, or if the hearing has closed, he shall proceed with issuance of his /intermediate report/ decision, and the provisions of section 102.26, with respect to review of rulings of trial examiners, shall thereupon apply.

/INTERMEDIATE REPORT/ TRIAL EXAMINER'S DECISION AND
TRANSFER OF CASE TO THE BOARD

Sec. 102.45 /Intermediate report and recommended order/ Trial examiner's decision: contents: service: transfer of the case to the Board; contents of record in case.--(a) After hearing for the purpose of taking evidence upon a complaint, the trial examiner shall prepare /an intermediate report and recommended order, but the initial decision shall be made by the Board /a decision. Such /report/ decision shall contain findings of fact, conclusions, and the reasons or basis therefor, upon all material issues of fact, law, or discretion presented on the record, and /the recommended orders/ shall contain recommendations as to what disposition of the case should be made, which may include, if it be found that the respondent has engaged in or is engaging in the alleged unfair labor practices, a recommendation for such affirmative action by the respondent as will effectuate the policies of the act. The trial examiner shall file the original of /the intermediate report and recommended order/ his decision with the Board and cause a copy thereof to be served upon each of the parties. Upon the filing of the /report and recommended order/ decision, the Board shall enter an order transferring the case to the Board and shall serve copies of the order, setting forth the date of such transfer, upon all the parties. Service of the /intermediate report/ trial examiner's decision and of the order transferring the case to the Board shall be complete upon mailing.

(b) The charge upon which the complaint was issued and any amendments thereto, the complaint and any amendments thereto, notice of hearing, answer and any amendments thereto, motions, rulings, orders, the stenographic report of the hearing, stipulations, exhibits, documentary evidence, and depositions, together with the /intermediate report and recommended order/ trial examiner's decision and exceptions, and any cross-exceptions or answering briefs as provided in section 102.46, shall constitute the record in the case.

Sec. 102.46 Exceptions /or supporting briefs/. cross-exceptions, briefs, answering briefs; time for filing; where to file; service on parties; extension of time; effect of failure to include matter in exceptions; oral arguments.--(a) Within 20 days, or within such further period as the Board may allow, from the date of the service of the order transferring the case to the Board, pursuant to section 102.45, any party may (in accordance with section 10(c) of the act and sections 102.113 and /section/ 102.114 of these rules) file with the Board in Washington, D.C., /seven copies of a statement in writing setting forth/ exceptions to the /intermediate report and recommended order/ trial examiner's decision or to any other part of the record or proceedings (including rulings upon all motions or objections), together with /seven copies of/ a brief in support of said exceptions, /and immediately upon such filing copies shall be served on each of the other parties; and/ Any party may, within the same period, file /seven copies of/ a brief in support of the /intermediate report and recommended order/ trial examiner's decision. /Copies/ The filing of such exceptions and briefs /shall immediately be served on each of the other parties/ is subject to the provisions of subsection (j) of this section. /Statements of exceptions and briefs shall designate by precise citation of page and line the portions of the record relied upon. Upon special leave of the Board, any party may file a reply brief upon such terms as the Board may impose./ Requests /for such leave or/ for extension of /the/ time /in which/ to file exceptions or briefs /under authority of this section/ shall be in writing and copies thereof shall be /immediately/ served promptly on /each of/ the other parties. Such requests /for an extension/ must be received by the Board 3 days prior to the due date.

(b) Each exception (1) shall set forth specifically the questions of procedure, fact, law, or policy to which exceptions are taken; (2) shall identify that part of the trial examiner's decision to which objection is made; (3) shall designate by precise citation of page the portions of the record relied upon; and (4) shall state the grounds for the exceptions and shall include the citation of authorities unless set forth in a supporting brief. Any exception to a ruling, finding, conclusion, or recommendation which is not specifically urged shall be deemed to have been waived. Any exception which fails to comply with the foregoing requirements may be disregarded.

(c) Any brief in support of exceptions shall contain no matter not included within the scope of the exceptions and shall contain, in the order indicated, the following:

(1) A concise statement of the case containing all that is material to the consideration of the questions presented.

(2) A specification of the questions involved and to be argued.

(3) The argument, presenting clearly the points of fact and law relied upon in support of the position taken on each question, with specific page reference to the transcript and the legal or other material relied upon.

Sec. 102.46 Exceptions /or supporting briefs/ cross-exceptions, briefs, answering briefs; time for filing; where to file; service on parties; extension of time; effect of failure to include matter in exceptions; oral arguments. --(a) Within 20 days, or within such further period as the Board may allow, from the date of the service of the order transferring the case to the Board, pursuant to section 102.45, any party may (in accordance with section 10(c) of the act and sections 102.113 and /section/ 102.114 of these rules) file with the Board in Washington, D.C., /seven copies of a statement in writing setting forth/ exceptions to the /intermediate report and recommended order/ trial examiner's decision or to any other part of the record or proceedings (including rulings upon all motions or objections), together with /seven copies of/ a brief in support of said exceptions, /and immediately upon such filing copies shall be served on each of the other parties; and/ Any party may, within the same period, file /seven copies of/ a brief in support of the /intermediate report and recommended order/ trial examiner's decision. /Copies/ The filing of such exceptions and briefs /shall immediately be served on each of the other parties/ is subject to the provisions of subsection (j) of this section. /Statements of exceptions and briefs shall designate by precise citation of page and line the portions of the record relied upon. Upon special leave of the Board, any party may file a reply brief upon such terms as the Board may impose./ Requests /for such leave or/ for extension of /the/ time /in which/ to file exceptions or briefs /under authority of this section/ shall be in writing and copies thereof shall be /immediately/ served promptly on /each of/ the other parties. Such requests /for an extension/ must be received by the Board 3 days prior to the due date.

(b) Each exception (1) shall set forth specifically the questions of procedure, fact, law, or policy to which exceptions are taken; (2) shall identify that part of the trial examiner's decision to which objection is made; (3) shall designate by precise citation of page the portions of the record relied upon; and (4) shall state the grounds for the exceptions and shall include the citation of authorities unless set forth in a supporting brief. Any exception to a ruling, finding, conclusion, or recommendation which is not specifically urged shall be deemed to have been waived. Any exception which fails to comply with the foregoing requirements may be disregarded.

(c) Any brief in support of exceptions shall contain no matter not included within the scope of the exceptions and shall contain, in the order indicated, the following:

(1) A concise statement of the case containing all that is material to the consideration of the questions presented.

(2) A specification of the questions involved and to be argued.

(3) The argument, presenting clearly the points of fact and law relied upon in support of the position taken on each question, with specific page reference to the transcript and the legal or other material relied upon.

(d) Within 10 days, or such further period as the Board may allow, from the last date on which exceptions and any supporting brief may be filed, a party opposing the exceptions may file an answering brief to the exceptions, in accordance with the provisions of subsection (j) of this section. The provision for 3 additional days as contained in section 102.114 shall be applicable to this subsection.

The answering brief to the exceptions shall be limited to the questions raised in the exceptions and in the brief in support thereof. It shall present clearly the points of fact and law relied upon in support of the position taken on each question. Where exception has been taken to a factual finding of the trial examiner and it is proposed to support that finding, the answering brief should specify those pages of the record which, in the view of the party filing the brief, support the examiner's finding.

Requests for extension of time to file an answering brief to the exceptions shall be in writing and copies thereof shall be served promptly on the other parties. Such requests must be received by the Board 3 days prior to the due date.

(e) Any party who has not previously filed exceptions may, within 10 days, or such further period as the Board may allow, from the last date on which exceptions and any supporting brief may be filed, file cross-exceptions to any portion of the trial examiner's decision, together with a supporting brief, in accordance with the provisions of subsections (b) and (j) of this section.

(f) Within 10 days, or such further period as the Board may allow, from the last date on which cross-exceptions and any supporting brief may be filed, any other party may file an answering brief to such cross-exceptions in accordance with the provisions of subsections (c) and (j) of this section. Such answering brief shall be limited to the questions raised in the cross-exceptions. The provision for 3 additional days as contained in section 102.114 shall be applicable to this subsection.

Requests for extension of time to file cross-exceptions, or answering brief to cross-exceptions, shall be in writing and copies thereof shall be served promptly on the other parties. Such requests must be received by the Board 3 days prior to the due date.

(g) No further briefs shall be filed except by special leave of the Board. Requests for such leave shall be in writing and copies thereof shall be served promptly on the other parties.

(b) (h) No matter not included in /a statement of/ exceptions or cross-exceptions may thereafter be urged before the Board, or in any further proceeding.

[c] (1) Should any party desire permission to argue orally before the Board, request therefor must be made in writing to the Board simultaneously with the statement of any exceptions or cross-exceptions filed pursuant to the provisions of paragraph (a) of this section with a statement of service on all the other parties furnished with such request. The Board shall notify the parties of the time and place of oral argument, if such permission is granted. [d] Oral arguments are limited to 30 minutes for each party entitled to participate. No request for additional time will be granted unless timely application is made in advance of oral argument.

[c] (j) Exceptions to intermediate reports and recommended orders/ trial examiners' decisions, or to the record, briefs in support of exceptions, and briefs in support of intermediate reports and recommended orders/ trial examiners' decisions, cross-exceptions, and answering briefs shall be printed or otherwise legibly duplicated: Provided, however, That carbon copies of typewritten matter shall not be filed and if submitted will not be accepted. Seven copies of such documents shall be filed with the Board in Washington, D.C., and copies shall also be served promptly on the other parties. Where any brief filed pursuant to this section exceeds 20 pages, it shall contain a subject index with page references and an alphabetical table of cases and other authorities cited.

Sec. 102.48 Action of Board upon expiration of time to file exceptions to /intermediate report/ trial examiner's decision; decisions by the Board; extraordinary postdecisional motions.--

(a) In the event no /statement of/ timely or proper exceptions /is/ are filed as herein provided, the findings, conclusions, and recommendations of the trial examiner as contained in his /intermediate report and recommended order/ decision shall /be adopted by the Board/, pursuant to section 10(c) of the act, automatically become the decision and order of the Board and become its findings, conclusions, and order, and all objections and exceptions thereto shall be deemed waived for all purposes. However, the Board may, in its discretion, order such case closed upon compliance.

(b) Upon the filing of /a statement of/ timely and proper exceptions /and briefs/, and any cross-exceptions, or answering briefs, as provided in section 102.46, the Board may decide the matter forthwith upon the record, or after oral argument, or may reopen the record and receive further evidence before a member of the Board or other Board agent or agency, or may close the case upon compliance with recommendations of the /intermediate report/ trial examiner decision, or make other disposition of the case.

(c) Where exception is taken to a factual finding of the trial examiner, the Board, in determining whether the finding is contrary to a preponderance of the evidence, may limit its consideration to such portions of the record as are specified in the exceptions, the supporting brief, and the answering brief.

(d) A party to a proceeding before the Board may, because of extraordinary circumstances, move for reconsideration, rehearing, or reopening of the record after the Board decision or order. A motion for reconsideration shall state with particularity the material error claimed and with respect to any finding of material fact shall specify the page of the record relied on. A motion for rehearing shall specify the error alleged to require a hearing de novo and the prejudice to the movant alleged to result from such error. A motion to reopen the record shall state briefly the additional evidence sought to be adduced, why it was not presented previously, and that, if adduced and credited, it would require a different result. Only newly discovered evidence, evidence which has become available only since the close of the hearing, or evidence which the Board believes should have been taken at the hearing will be taken at any further hearing.

Any motion pursuant to this subsection shall be filed within 20 days, or such further period as the Board may allow, after the service of its decision or order, except that a motion for leave to adduce additional evidence shall be filed promptly upon discovery of such evidence.

The filing and pendency of a motion under this provision shall not operate to stay the effectiveness of the action of the Board unless so ordered. A motion for reconsideration or rehearing need not be filed to exhaust administrative remedies.

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Sec. 102.69 (e) In a case involving a consent election held pursuant to section 102.62(b), if exceptions are filed, either to the report on challenged ballots or objections, or both if it be a consolidated report, and it appears to the Board that such exceptions do not raise substantial and material issues with respect to the conduct or results of the election, the Board may decide the matter forthwith upon the record, or may make other disposition of the case. If it appears to the Board that such exceptions raise substantial and material factual issues, the Board may direct the regional director or other agent of the Board to issue and cause to be served upon the parties a notice of hearing on said exceptions before a hearing officer. The hearing shall be conducted in accordance with the provisions of sections 102.64, 102.65, and 102.66, insofar as applicable. Upon the close of the hearing the agent conducting the hearing, if directed by the Board, shall prepare and cause to be served upon the parties a report resolving questions of credibility and containing findings of fact and recommendations to the Board as to the disposition of the challenges or objections, or both if it be a consolidated report. In any case in which the Board has directed that a report be prepared and served, any party may within 10 days from the date of issuance of the report on challenged ballots or objections, or both, or within such further period as the Board may allow, file with the Board in Washington, D.C., seven copies of exceptions to such report, which shall be printed or otherwise legibly duplicated except that carbon copies of typewritten matter shall not be filed and if submitted will not be accepted: Provided, however, That in any proceeding wherein a representation case has been consolidated with an unfair labor practice case for purposes of hearing the provisions of section 102.46 of these rules shall govern with respect to the filing of exceptions to the /intermediate report and recommended order/ trial examiner's decision. Immediately upon the filing of such exceptions, the party filing the same shall serve a copy thereof upon each of the other parties and shall file a copy with the regional director. A statement of service shall be made to the Board simultaneously with the filing of exceptions. If no exceptions are filed to such report, the Board, upon the expiration of the period for filing such exceptions, may decide the matter forthwith upon the record or may make other disposition of the case. The Board shall thereupon proceed pursuant to section 102.67.

Requests for extension of time to file exceptions under authority of this section shall be in writing and copies thereof shall be served promptly on each of the other parties. Such requests must be received by the Board 3 days prior to the due date.

Heading changed to read as follows:

Sec. 102.81 Review by the general counsel; resumption of proceedings upon charge held during pendency of petition.--

Sec. 102.111 Service of process and papers; proof of service.--

(a) Charges, complaints and accompanying notices of hearing, final orders, /intermediate reports/ trial examiners' decisions, and subpoenas of the Board, its member, agent, or agency, may be served personally or by registered mail or by telegraph or by leaving a copy thereof at the principal office or place of business of the person required to be served. The verified return by the individual so serving the same, setting forth the manner of such service, shall be proof of the same, and the return post office receipt or telegraph receipt therefor when registered and mailed or telegraphed as aforesaid shall be proof of service of the same.

Sec. 102.118 Same; Board employees prohibited from producing files, records, etc., pursuant to subpoena ad testificandum or subpoena duces tecum, prohibited from testifying in regard thereto.-- No regional director, field examiner, trial examiner, attorney, specially designated agent, general counsel, member of the Board, or other officer or employee of the Board shall produce or present any files, documents, reports, memoranda, or records of the Board or testify in behalf of any party to any cause pending in any court or before the Board, or any other board, commission, or other administrative agency of the United States, or of any State, Territory, or the District of Columbia with respect to any information, facts, or other matter coming to his knowledge in his official capacity or with respect to the contents of any files, documents, reports, memoranda, or records of the Board, whether in answer to a subpoena, subpoena duces tecum, or otherwise, without the written consent of the Board or the chairman of the Board if the official or document is subject to the supervision or control of the Board; or the general counsel if the official or document is subject to the supervision or control of the general counsel. Whenever any subpoena ad testificandum or subpoena duces tecum, the purpose of which is to adduce testimony or require the production of records as described hereinabove, shall have been served upon any such persons or other officer or employee of the Board, he will, unless otherwise expressly directed by the Board or the chairman of the Board or the general counsel, as the case may be, move pursuant to the applicable procedure, whether by petition to revoke, motion to quash, or otherwise, to have such subpoena invalidated on the ground that the evidence sought is privileged against disclosure by this rule: Provided, After a witness called by the general counsel has testified in a hearing upon a complaint under section 10(c) of the act, the respondent may move for the production of any statement of such witness in possession of the general counsel, if such statement has been reduced to writing and signed or otherwise approved or adopted by the witness. Such motion shall be granted by the trial examiner. If the general counsel declines to furnish the statement, the testimony of the witness shall be stricken^[7].

Provided further, That after any witness has testified in any post-election hearing pursuant to section 102.69(d), any party may move for the production of any statement of such witness in possession of any agent of the Board, if such statement has been reduced to writing and signed or otherwise approved by the witness. Such motion shall be granted by the hearing officer.

Heading amended and footnote added:

Subpart L - PRACTICE BEFORE THE BOARD OF FORMER EMPLOYEES*

*Attention is directed to Public Law 87-849 (76 Stat. 1119) which amends Chapter 11 of Title 18, United States Code, entitled "Bribery, Graft and Conflicts of Interest" and which provides for the imposition of criminal sanctions under certain circumstances.

Sec. 101.11 /Intermediate report (recommended decision)/ Trial examiner's decision.--(a) At the conclusion of the hearing the trial examiner prepares /an intermediate report (recommended decision)/ a decision stating findings of fact and conclusions, as well as the reasons for his determinations on all material issues, and making recommendations as to action which should be taken in the case. The trial examiner may recommend dismissal or sustain the complaint, in whole or in part, and recommend that the respondent cease and desist from the unlawful acts found and take action to remedy their effects.

(b) The /Intermediate report/ trial examiner's decision is filed with the Board in Washington, D.C., and copies are simultaneously served on each of the parties. At the same time the Board, through its executive secretary, issues and serves on each of the parties an order transferring the case to the Board. The parties may accept and comply with the recommendations of the trial examiner, and thus normally conclude the entire proceedings at this point. Or, the parties or counsel for the Board may file exceptions to the /intermediate report/ trial examiner's decision with the Board /and may also/. Whenever any party files exceptions, any other party may file an answering brief limited to questions raised in the exceptions and/or may file cross-exceptions relating to any portion of the trial examiner's decision. Cross-exceptions may be filed only by a party who has not previously filed exceptions. Whenever any party files cross-exceptions, any other party may file an answering brief to the cross-exceptions. The parties may request permission to appear and argue orally before the Board in Washington, D.C. They may also submit proposed findings and conclusions to the Board. /Oral argument is very frequently granted./

Sec. 101.12 Board decision and order.--(a) If any party files exceptions to the /intermediate report/ trial examiner's decision, the Board, with the assistance of the legal assistants to each Board member who function in much the same manner as law clerks do for judges, reviews the entire record, including the trial examiner's /report/ decision and recommendations, the exceptions thereto, the complete transcript of evidence, and the exhibits, briefs, and arguments. The Board does not consult with members of the trial examining staff or with any agent of the general counsel in its deliberations. It then issues its decision and order in which it may adopt, modify, or reject the findings and recommendations of the trial examiner. The decision and order contains detailed findings of fact, conclusions of law, and basic reasons for decision on all material issues raised, and an order either dismissing the complaint in whole or in part or requiring the respondent to cease and desist from its unlawful practices and to take appropriate affirmative action.

(b) If no exceptions are filed to the /intermediate report/ trial examiner's decision, and the respondent does not comply with its recommendations, /the Board adopts the report and recommendations of the trial examiner/ his decision and recommendations automatically become the decision and order of the Board, pursuant to section 10(c) of the act, and become its findings, conclusions, and order. All objections and exceptions, whether or not previously made during or after the hearing, are deemed waived for all purposes.

(c) If no exceptions are filed to the /intermediate report/ trial examiner's decision and its recommendations and the respondent complies therewith, the case is normally closed but the Board may, if it deems necessary in order to effectuate the policies of the act, adopt the /report/ decision and recommendations of the trial examiner.

